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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-19a) is not yet reported.

JURISDICTION

The order of the district court granting summary judgment against the United States (App. A, *infra*, 1a-19a) was entered on August 29, 1979. The United States filed a notice of appeal from this order on

September 26, 1979 (App. C, *infra*, 22a-23a). On November 19, 1979, Mr. Justice Stevens extended the time for docketing the appeal to and including December 24, 1979.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

QUESTIONS PRESENTED

1. Whether the 1976 Pay Act (Pub. L. No. 94-440, 90 Stat. 1439, 1446) and the 1977 Pay Act (Pub. L. No. 95-66, 91 Stat. 270) served to supersede or rescind the provisions of the Executive Salary Cost-of-Living Adjustment Act that authorized cost-of-living increases in 1976 and 1977 for, among other ranking government officials, Article III judges.

2. Whether, at the time the 1976 and 1977 Pay Acts were enacted, the cost-of-living increases pre-

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[1] On September 24, 1979, the clerk of the district court entered judgment (App. B, *infra*, 20a-21a) on the district court's decision. The government was unaware of the entry of this judgment at the time it filed the notice of appeal on September 26. As a precaution, on October 17, 1979, the United States filed a notice of appeal (App. D, *infra*, 24a-25a) from the September 24 judgment. Because 28 U.S.C. 1252 permits a direct appeal to this Court from an "interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional in any civil action * * * to which the United States * * * is a party," and because 28 U.S.C. 2101(a) requires the notice of appeal in such cases to be filed within 30 days "after the entry of the interlocutory or final order, judgment or decree," it appears that the operative notice of appeal is the one filed on September 26, 1979.

scribed in the Adjustment Act constituted "compensation" of Article III judges within the meaning of the Compensation Clause of the Constitution.

3. Whether the failure to increase the salaries of Article III judges in accordance with the Adjustment Act violated the Compensation Clause, where such failure did not represent a discriminatory attack on Article III judges and was not done with the purpose or effect of undermining their independence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause of the Constitution, the pertinent portions of the applicable salary statutes, and 28 U.S.C. 2109 are set forth in Appendix E, *infra*, 26a-33a.

STATEMENT

This case is a class action brought under Fed. R. Civ. P. 23(b)(2) on behalf of all persons who were Article III judges in 1976 and 1977. Appellees contend that two Acts of Congress that superseded scheduled cost-of-living increases for, *inter alia*, federal judges in 1976 and 1977 are invalid under the Compensation Clause of the Constitution (Article III, Section 1; App. E, *infra*, 26a). After certifying the class, the district court granted appellees' motion for summary judgment. The court held that the failure to increase the judges' salaries constituted a diminishment of their compensation and that the Acts were therefore unconstitutional. The court also found that, as a matter of statutory construction, neither of the

Acts served to modify or repeal existing legislation prescribing the cost-of-living adjustments.

1. The federal pay system consists of a complex array of statutory and regulatory provisions. Insofar as pertinent here, this system may be summarized as follows.

The salaries of federal judges, as well as those of the Vice President, Cabinet officers and other heads of agencies, members of Congress, and additional designated officials of the executive, legislative, and judicial branches, are determined pursuant to the Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, Title II, Section 225(a)-(k), 81 Stat. 642-645, 2 U.S.C. 351-361 ("Federal Salary Act"). See 2 U.S.C. 356.[2] Under this Act, the salaries of these officials are reviewed every four years (commencing in fiscal year 1969) by the Commission on Executive, Legislative, and Judicial Salaries appointed in accordance with the terms of the statute. See 2 U.S.C. 352, 356. This "review by the Commission shall be made for the purpose of determining and providing (i) the appropriate pay levels and relationships between and among the respective offices and positions covered by such review, and (ii) the appropriate pay relationships between such offices and positions and the offices and positions subject to [classification and General Schedule (GS) pay rates under 5 U.S.C. 5101 *et seq.*, 5331 *et seq.*]." 2 U.S.C. 356. The Commission then reports to the President the results of its

[2] The salary of the Vice President was brought within the Act in 1975. Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, Section 206, 89 Stat. 423.

review and its salary recommendations. 2 U.S.C. 357. Thereafter, in the next budget transmitted to Congress, the President recommends the exact rates of pay that he deems advisable for each of these offices and positions. 2 U.S.C. 358. The President's recommendations become final and effective, at the time provided in the Act, following approval by both Houses of Congress. 2 U.S.C. (Supp. I) 359.

The Federal Salary Act contains no provision for annual adjustments to the salaries of officials covered by the Act, including federal judges. Rather, the sole means specified in that Act for modifying such salaries is the quadrennial review process. In 1975, however, Congress enacted the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419 ("Adjustment Act"). This Act is generally applicable to the offices covered by the Federal Salary Act,[3] including those of the Vice President (3 U.S.C. 104), Cabinet officers and other Executive Schedule officials (5 U.S.C. 5318), members of Congress (2 U.S.C. 31), and federal judges (28 U.S.C. 461).[4] Under the Adjustment Act, such salaries are

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[3] Apparently, the only exception concerns the Governors of the United States Postal Service, who are subject to the Federal Salary Act (2 U.S.C. 356(E)) but are not covered by the Adjustment Act (see 39 U.S.C. 202(a)). In addition, the Adjustment Act indirectly affects those General Schedule (GS) employees whose salaries are at the statutory maximum set by the lowest Executive Schedule rate. See note 6, *infra*.

[4] 28 U.S.C. 461 extends to federal judges by virtue of 28 U.S.C. 5 (Supreme Court justices), 44(d) (court of appeals judges), 135 (district court judges), 173 (Court of Claims

subject to an annual adjustment equal to the average percentage cost-of-living adjustment made in the General Schedule (GS) pay rates pursuant to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301, 5305-5308 ("Comparability Act").[5]

Annual cost-of-living adjustments under the Comparability Act are governed by 5 U.S.C. 5305. The initial step in this process is for the President to designate an appropriate agent to compare the GS rates "with the rates of pay for the same levels of work in private enterprise as determined * * * by the Bureau of Labor Statistics * * *." 5 U.S.C. 5305(a)(1)(A). Following this study, the agent submits to

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judges), and 213 (Court of Customs and Patent Appeals judges). See also 28 U.S.C. 252 (Customs Court judges) and 792 (Court of Claims commisisoners); 11 U.S.C. 68 (bankruptcy referees). In addition, other non-Article III judges included in the Federal Salary Act are indirectly covered by the Adjustment Act because their salaries are expressly set at the level of district court or court of appeals judges. See 10 U.S.C. 867(a)(1) (Court of Military Appeals judges); 26 U.S.C. 7443(c) (Tax Court judges). See also 28 U.S.C. 603, as amended, Pub. L. No. 95-539, Section 6, 92 Stat. 2044 (Director and Deputy Director of the Administrative Office of the United States Courts).

[5] Under the Comparability Act, and hence also under the Adjustment Act, cost-of-living adjustments can result in salary decreases as well as increases, depending upon economic conditions. However, Congress provided in the Adjustment Act that a salary adjustment not be made "to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office." 28 U.S.C. 461(b).

the President a report that makes the above comparison between GS and private salaries and recommends appropriate adjustments in the GS rates of pay. 5 U.S.C. 5305(a)(1).

After considering this report and also the findings and recommendations of the Advisory Committee on Federal Pay (5 U.S.C. 5305(a)(2), 5306), the President may adjust the GS rates in accordance with the principles of comparability contained in 5 U.S.C. 5301(a), in which event he must transmit to Congress a report of the pay adjustment including a determination of the overall percentage adjustment in the General Schedule. 5 U.S.C. 5305(a)(2), (3). However, if, "because of national emergency or economic conditions affecting the general welfare," the President considers it inappropriate to make such an adjustment, he must transmit to Congress an alternative plan setting forth an appropriate adjustment and specifying the overall percentage increase (or decrease) in the GS rates of pay. 5 U.S.C. 5305(c)(1). The President's alternative plan becomes effective "on the first day of the first applicable pay period commencing on or after October 1 of the applicable year," and thereafter remains in effect, unless, within 30 legislative days as defined in the statute, either House of Congress adopts a resolution disapproving the alternative plan. 5 U.S.C. 5305(c)(2). In that event, the President must again consider the report of his agent and adjust the rates of pay in accordance with the principles of comparability. 5 U.S.C. 5305(c)(2), (m). See *National*

Treasury Employees Union v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

2. In October 1975, GS salaries were increased by an overall average of 5% pursuant to the Comparability Act, and federal judges and others covered by the Adjustment Act received a like increase. Exec. Order No. 11883, 3 C.F.R. 1024 (1971-1975 Comp.); 11 Weekly Comp. of Pres. Docs. 910 (Aug. 29, 1975). This adjustment raised the annual salary of district judges to $42,000 and of court of appeals judges to $44,600.

In October 1976, GS salaries were increased under the Comparability Act by an overall average of 4.8%. Exec. Order No. 11941, 3 C.F.R. 151 (1976 Comp.); 12 Weekly Comp. of Pres. Docs. 1435 (Oct. 1, 1976). On October 1, 1976, Congress enacted the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, 1446 (App. E, *infra*, 31a) ("1976 Pay Act"). The 1976 Pay Act provided that "none of the funds appropriated in this Act or in any other Act shall be used to pay the salary [of an individual covered by the Federal Salary Act] * * * at a rate which exceeds the salary rate in effect on September 30, 1976 [except increases pursuant to the four-year review of the Federal Salary Act] * * *" (*ibid.*). Because of this provision, cost-of-living increases that otherwise would have taken effect under the Adjustment Act did not occur for officials within the Federal Salary Act, including the Vice President, Cabinet officers and other Executive Schedule personnel. members of Congress, and federal judges.

Less than four months later, in January 1977, the President recommended substantial salary increases for these officials pursuant to the quadrennial review under the Federal Salary Act. For example, salaries for district judges were increased by 29.8% to $54,500, and salaries for court of appeals judges were increased by 28.9% to $57,500. These increases became effective in March 1977. 42 Fed. Reg. 10297 (1977).

In order "to deal with the anomalous situation of Members of Congress, high level Federal executives and Federal judges receiving two pay raises in the same calendar year," H.R. Rep. No. 95-458, 95th Cong., 1st Sess. 2 (1977), Congress in July 1977 passed Pub. L. No. 95-66, 91 Stat. 270 (App. E, *infra*, 32a) ("1977 Pay Act"). The 1977 Pay Act provided that the cost-of-living increases that otherwise would have become effective in October 1977 under the Adjustment Act "shall not take effect" for the Vice President, members of Congress, Cabinet officers and Executive Schedule officials, and federal judges, commissioners and referees. As the House Report explained (H.R. Rep. No. 95-458, *supra*, at 1, 2):

> The sole purpose of [the 1977 Pay Act] is to eliminate the expected October 1977 comparability adjustment for certain individuals in the executive, legislative, and judicial branches whose rates of pay were increased earlier this year pursuant to the recommendations of the Quadrennial Commission.

* * * * *

> The purpose of the comparability pay system is to insure that pay rates in the Federal service will remain comparable to those in the private sector. Thus, in essence, that system serves much the same purpose as do the recommendations of the Quadrennial Commission. Since those recommendations have now been implemented and the goals of comparability have been achieved, this committee believes it would be inappropriate for persons covered by the Quadrennial Commission's recommendations to receive a comparability increase this October.

In October 1977, GS salaries, which generally had not been affected by the March 1977 increase pursuant to the quadrennial review,[6] were raised by an overall average of 7.1% under the Comparability Act. Exec. Order No. 12010, 3 C.F.R. 142 (1977 Comp.); 13 Weekly Comp. of Pres. Docs. 1436 (Sept. 20, 1977).

3. On February 7, 1978, appellees commenced this litigation in the United States District Court for the Northern District of Illinois to challenge the 1976 and 1977 Pay Acts.[7] As elaborated in the memorandum in support of their motion for summary judg-

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[6] GS salaries are not subject to the Federal Salary Act. However, under 5 U.S.C. 5308, the lowest level in the Executive Schedule sets a ceiling that cannot be exceeded by any GS salary. The March 1977 increase under the Federal Salary Act served to raise this ceiling from $39,600 to $47,500, and thus those GS employees who had reached the previous ceiling benefited from this increase.

[7] The jurisdiction of the district court was invoked under the Tucker Act, 28 U.S.C. 1346(a)(2) (App. A, *infra*, 2a).

ment, appellees contended in Count I of the amended complaint that the 1976 Pay Act was merely an appropriations measure that refused to provide funds for the 1976 cost-of-living increase but did not modify their substantive entitlement to the increase under the Adjustment Act (App. A, *infra*, 4a; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 25-32). Alternatively, appellees argued that the 1976 Pay Act was unconstitutional under the Compensation Clause insofar as it denied them the 1976 cost-of-living increase (App. A, *infra*, 4a; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 25, 32). In Count II of the amended complaint, appellees asserted that the 1977 Pay Act violated the Compensation Clause by superseding the cost-of-living adjustment scheduled to take effect in October 1977 (App. A, *infra*, 5a; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 33-35). Appellees sought a declaration that the failure to pay them the 1976 and 1977 cost-of-living adjustments was unlawful and an injunction requiring the United States to pay them these salary increases.

By order dated March 20, 1979, the district court granted appellees' motion for class certification under Fed. R. Civ. P. 23(b)(2). The Count I class, relating to the 1976 Pay Act, was defined to be all persons who served as Article III judges during part or all of the period between October 1, 1976, when the 1976 cost-of-living adjustment was scheduled to take effect, and March 1, 1977, when a salary increase

occurred pursuant to the Federal Salary Act. The Count II class, relating to the 1977 Pay Act, consisted of all persons who were appointed Article III judges prior to July 11, 1977 (the date of enactment of the 1977 Pay Act) and held office subsequent to October 1, 1977 (the date on which, but for the 1977 Pay Act, the 1977 cost-of-living adjustment would have become effective for federal judges). The district court's order expressly noted that no judge appointed after July 11, 1977, was a member of either class.[8]

On August 29, 1979, the district court granted appellees' motion for summary judgment (App. A, *infra*, 1a-19a). The court held that the failure to increase the salaries of federal judges in 1976 and 1977 in accordance with the Adjustment Act constituted a diminution of the judges' compensation and thus violated the Compensation Clause. In reaching this result, the court agreed with appellees that (*id.* at 7a-8a)

> once the * * * [Adjustment Act,] granting judges "a salary at an annual rate determined under * * * [the Federal Salary Act] as adjusted by Section 461 of this Title," became law [in 1975], the right to an annual adjustment, measured by the average adjustment in the General Schedule, became a part of a judges' [*sic*] compensation which may not be "diminished."

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[8] The district judge in this case had been appointed to the bench subsequent to July 11, 1977, and thus was not a member of either class.

Finding that the failure to pay the 1976 and 1977 cost-of-living adjustments represented a direct reduction of the judges' compensation, the court concluded that the 1976 and 1977 Pay Acts were unconstitutional even though they "[did] not discriminate against judges * * * [or] make inroads on their independence" (*id.* at 16a). In addition, as a matter of statutory construction, the court held that neither the 1976 Pay Act nor the 1977 Pay Act modified or repealed the substantive provisions of the Adjustment Act authorizing an annual cost-of-living increase for judges (*id.* at 18a). The court thus entered judgment for appellees for the unspecified amounts of unpaid compensation on both counts of their complaint (*id.* at 20a-21a).

THE QUESTIONS ARE SUBSTANTIAL

This case presents important questions regarding the constitutional relationship of the Legislative and Judicial Branches. The district court has held unconstitutional two Acts of Congress, insofar as they applied to Article III judges, that superseded scheduled cost-of-living increases in 1976 and 1977 for high-ranking government officials including, in addition to judges, the Vice President, Cabinet officers and other top Executive Branch personnel, and members of Congress. In our view, nothing in the Compensation Clause requires an exemption for Article III judges from federal statutes such as the Pay Acts that do not, in either purpose or effect, discriminate against judges or constitute an attack on their in-

dependence. Moreover, by holding that future increases in judges' salaries under the Adjustment Act are part of the "compensation" that cannot constitutionally be diminished, the district court's decision would effectively prevent Congress from ever modifying, for sitting federal judges, the existing statutory pay system. Such a result would unduly curtail legislative prerogatives in this area and would, as a matter of constitutional doctrine, forever freeze into law the present salary plan that Congress enacted less than five years ago.

The issues presented in this case are also likely to be recurring. Federal judges have already brought another action under the Compensation Clause challenging the extent of their salary increases for 1978 and 1979,[9] and the Director of the Administrative Office of the United States Courts has likewise filed suit contesting the 1979 judicial salary increase.[10] In addition, under the district court's interpretation that the 1976 and 1977 Pay Acts did not substantively supersede the cost-of-living increases, members of Congress and many Executive Branch em-

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[9] In *Will* v. *United States*, No. 79 C 4368 (N.D.Ill., filed Oct. 19, 1979), plaintiffs have challenged (1) Section 304(a)(1) of the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 788-789, which superseded the Adjustment Act increase scheduled for October 1978, and (2) Section 101(c) of Pub. L. No. 96-86, 93 Stat. 657 (1979), which limits the Adjustment Act increase effective in October 1979 to 5.5%.

[10] See *Foley* v. *Carter*, No. 79-3063 (D.D.C., filed Nov. 9, 1979).

ployees might assert a claim to salary increases. Similarly, because, under the district court's construction, the 1977 cost-of-living increase would be part of the base judicial salary for subsequent years, recently appointed Article III judges who are not members of the classes in this case may also seek higher salaries.[11]

Finally, the district court's decision would impose substantial expense and administrative burden on the government. Any salary increases resulting from the district court's decision are not limited to past years but, having become part of the base salary, also continue into the future until such time as the next quadrennial increase under the Federal Salary Act takes effect (currently scheduled for 1981). This is true not only for the class members in this case but also for all other officials who are entitled to increases under the court's construction of the 1977 Pay Act.[12]

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[11] We also note that the salaries of various other positions, although not protected against diminution by Article III, may be subject to increase under the district court's construction of the Pay Acts. See, *e.g.*, 28 U.S.C. 252 (Customs Court judges), 603, as amended, Pub. L. No. 95-539, Section 6, 92 Stat. 2044 (Director and Deputy Director of the Administrative Office of the United States Courts), and 792 (Court of Claims commissioners); 10 U.S.C. 867(a)(1) (Court of Military Appeals judges); 26 U.S.C. 7443(c) (Tax Court judges). In addition, GS employees who were at the pay ceiling in 1977 may also be entitled to increases under the district court's ruling. See 5 U.S.C. 5308; note 6, *supra*.

[12] This case presents a threshold question whether the Justices of this Court are disqualified to participate in this appeal. As noted above (pages 11-12, *supra*), the Count I and Count II classes certified by the district court include all persons who

were Article III judges during 1976 and 1977. Thus, the Justices of this Court are members of the classes and, as such, fall within the provisions of 28 U.S.C. 455(b)(4) and (5)(i) that disqualify any judge who has "a financial interest in the subject matter in controversy" or "[i]s a party to the proceeding." In addition, even if not formally class members, the Justices might have a sufficient interest in the outcome of the litigation to raise a question of disqualification. See 28 U.S.C. 455(a). See also *Evans* v. *Gore*, 253 U.S. 245, 247-248 (1920); *Atkins* v. *United States*, 556 F.2d 1028, 1035-1040 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

In the event that a direct appeal to this Court cannot be heard and determined because of the absence of a quorum of qualified Justices, 28 U.S.C. 2109 (App. E, *infra*, 32a-33a) and 28 U.S.C. 291 *et seq.* provide that the Chief Justice may remit the case to the court of appeals for the appropriate circuit to render a final and conclusive decision. However, the majority of federal judges are members of the classes in this case and thus would be disqualified; indeed, only one judge of the United States Court of Appeals for the Seventh Circuit is not a class member. More important, as discussed in the text, every currently sitting federal judge is affected by the district court's statutory ruling that the 1977 Pay Act did not modify the Adjustment Act or supersede the 1977 cost-of-living increase. Hence, all federal judges would be disqualified from participating in this appeal.

Because 28 U.S.C. 2109 is thus unavailable, we submit that the disqualification issue should be resolved by invoking the "rule of necessity"—that a judge is not disqualified if there is no other judge able to decide the case, thereby ensuring that the litigants are not deprived altogether of the judicial processes provided by law. See *Evans* v. *Gore*, *supra*. A decision by this Court is especially appropriate and important in the instant case, which presents significant issues concerning the separation of powers between the Legislative and Judicial Branches and turns on the interpretation of a constitutional provision that the Court has had little occasion to consider. Moreover, for the reasons set forth in the Memorandum for the United States on Certificate from the United States Court of Claims, *Atkins* v. *United States*, certificate dismissed, 426 U.S. 944 (1976), a copy of which is being sent to counsel

1. In a single paragraph at the end of its opinion, the district court ruled (App. A, *infra*, 18a) that neither the 1976 nor the 1977 Pay Act "contains language which expressly or impliedly indicates that Congress was modifying or repealing the provisions of the Adjustment Act." Because affirmance of the district court's judgment on this statutory ground would obviate the need for the Court to consider the constitutional issues presented, we address ourselves at the outset to the statutory question.[13]

The district court concluded (App. A, *infra*, 18a) that the 1976 Pay Act did not alter the substantive terms of the Adjustment Act, but instead was merely an appropriations measure that refused to fund the 1976 Adjustment Act increases. The court did not separately consider the 1977 Pay Act (which was not

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for appellees, we submit that 28 U.S.C. 455 did not abrogate the rule of necessity. See also *Duplantier* v. *United States*, 606 F.2d 654, 662-663 (5th Cir. 1979); *Atkins* v. *United States*, *supra*, 556 F.2d at 1039-1040; *Pilla* v. *American Bar Association*, 542 F.2d 56, 58-59 (8th Cir. 1976). Accordingly, in our view, the Justices of this Court are not barred from participating in the disposition of this case and, as the forum designated by Congress in 28 U.S.C. 1252, the Court can and should hear the appeal.

[13] A direct appeal pursuant to 28 U.S.C. 1252 "brings before [the Court], not only the constitutional question, but the whole case * * *." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975). See also *United States* v. *Raines*, 362 U.S. 17, 20, 27 n.7 (1960); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 541 (1939). Thus, the statutory issue is properly presented here and should be resolved before the Court turns to the constitutional questions involved in this case. See *Fusari* v. *Steinberg*, 419 U.S. 379, 387-388 n.13 (1975).

an appropriation statute) but nonetheless concluded (*ibid.*) that this Act also did not modify or repeal the provisions of the Adjustment Act.

In our view, the district court erred in construing the Pay Acts in this manner. With respect to the 1976 Pay Act, "[t]here can be no doubt that Congress could suspend or repeal * * * by an * * * appropriation bill" the Adjustment Act's authorization for the 1976 cost-of-living increases. *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940). Thus, the only question is whether Congress expressed with sufficient clarity its intention to amend substantive legislation by means of an appropriations act. Compare *TVA* v. *Hill*, 437 U.S. 153, 189-191 (1978).

We submit that there is ample indication of Congress' intent to supersede the Adjustment Act increase for 1976. The alternative construction of the 1976 Pay Act, advocated by appellees (Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 23) and adopted by the court below (App. A, *infra*, 18a), is that Congress simply refused to pay the full salaries that, arguendo, it recognized were required by law. It should not lightly be presumed, however, that Congress would act to deny funds to satisfy the government's acknowledged, lawful obligations under the Adjustment Act. Rather, the more likely inference is that Congress intended to amend the Adjustment Act in order to modify the basic obligations themselves.

The legislative history of the 1976 Pay Act confirms that Congress intended to bar the 1976 Adjustment Act increases. The 1976 Pay Act was intro-

duced on the floor of the House as an amendment to the Legislative Branch Appropriation Act of 1977. 122 Cong. Rec. 28861, 28872 (1976). In introducing the provision, Representative Shipley explained that the "amendment prevents the automatic cost-of-living pay increase * * * during the fiscal year ending September 30, 1977." *Id.* at 28872.[14] See also *id.* at 28862 (remarks of Rep. Shipley) ("My amendment is very simple. No [one] * * * will receive any increase in salary with regard to the cost-of-living increase"). This understanding—that the provision prohibited the cost-of-living adjustments—was repeatedly recognized in the floor debate on the Shipley Amendment.[15] Moreover, despite Representative

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[14] As originally proposed, the Shipley Amendment only applied to salary increases for members of the House of Representatives. However, the provision was later expanded to include all persons covered by the Federal Salary Act. See 122 Cong. Rec. 28877 (1976) (remarks of Rep. Udall). The bill initially passed by the Senate limited the 1976 Pay Act to members of Congress, but the Conference Committee accepted the House version that extended the Pay Act to all positions covered by the Federal Salary Act. See 122 Cong. Rec. 31859 (1976) (remarks of Sen. Hollings).

[15] See, *e.g.*, 122 Cong. Rec. 28863 (1976) (remarks of Rep. Coughlin) ("terminating the automatic cost-of-living increases * * * for this October"); *ibid.* (remarks of Rep. Armstrong) ("preclude a cost-of-living increase * * * during the current fiscal year"); *ibid.* (remarks of Rep. Yates) ("freeze the salaries"); *id.* at 28865 (remarks of Rep. McClory) ("effectively eliminate the present cost-of-living increases"); *id.* at 28870 (remarks of Rep. Derwinski) ("freezing * * * pay at its current level"); *id.* at 28872 (remarks of Rep. Armstrong) ("freeze the salary for the time being"); *id.* at 28877 (remarks of Rep. Udall) ("there

Wirth's explicit objection that it was inappropriate to enact substantive legislation in an appropriations bill (*id.* at 28863), the provision was overwhelmingly adopted by the House (*id.* at 28881).

Senate consideration of the provision reflects the same understanding. The floor debate contains numerous references to the fact that the Pay Act would eliminate the 1976 cost-of-living increase under the Adjustment Act.[16] This view was also expressed by Senator Hollings who, in submitting the Conference

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is not going to be a cost-of-living increase for [individuals covered by the Federal Salary Act]"); *id.* at 28880 (remarks of Rep. Anderson of California) ("block a cost-of-living pay increase for the Congress, Senators, super grades in the executive branch, and Federal judges"); *ibid.* (remarks of Rep. Vander Veen) (Shipley Amendment would "achieve the same end" as a bill Representative Vander Veen had previously sponsored to "eliminate cost-of-living increases for Congressmen").

[16] See, *e.g.*, 122 Cong. Rec. 29132 (1976) (remarks of Sen. Allen) ("the salary freeze * * * [adopted by] the House of Representatives"; "the House amendment providing for a salary freeze for top Federal officials in all three Branches of government"); *ibid.* (remarks of Sen. Taft) ("effectively freeze those salaries—the employees would not be given a cost-of-living raise on October 1, or a salary increase"); *id.* at 29164 (remarks of Sen. Allen) ("an amendment freezing the compensation of Members of Congress, House and Senate, the members of the judiciary, and the top ranking members of the executive branch"); *id.* at 29171 (remarks of Sen. Muskie) ("a freeze on * * * salaries"); *ibid.* (remarks of Sen. Helms) ("prevent implementation of a salary increase brought about by this past year's inflation"); *id.* at 29172 (remarks of Sen. Allen) ("denied the upcoming increase on October 1 * * * [T]heir salaries [would be] frozen at the September 30, 1976, level * * *").

Report on the bill, emphasized that the 1976 Pay Act was intended "to insure that none of the affected positions would receive this year's cost-of-living increase * * *." 122 Cong. Rec. 31860 (1976).[17] See also *id.* at 31862 (remarks of Sen. Percy) ("disallowing pay raises for Federal judges, top Government officials and employees, and members of Congress * * * a pay freeze"). Thus, we submit that the legislative history of the 1976 Pay Act demonstrates that Congress intended to supersede the provisions of the Adjustment Act authorizing cost-of-living increases to take effect in October 1976.[18]

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[17] We recognize that Senator Hollings had earlier stated that the 1976 Pay Act was "undraftsmanlike" because it "did not say that the salaries would not be increased under the law, but that the funds could not be used for any increases. The basic law is still there. There is a lawsuit about some of those already frozen, and we will apparently have another suit under this one." 122 Cong. Rec. 29168 (1976). This ambiguous statement can best be read as a criticism of the draftsmanship of the provision rather than as an affirmation of Congress' intent to leave intact the 1976 Adjustment Act increases. Senator Hollings' later remark, quoted in the text, indicates that he agreed with his colleagues that the Pay Act constituted a substantive amendment to the Adjustment Act with respect to 1976 increases.

[18] We are aware of the position of the General Accounting Office, relied on in Exec. Order No. 11941, to the effect that the 1976 Pay Act was merely a funding limitation rather than a substantive amendment to the Adjustment Act. See unpublished Comp. Gen Opinions, B-145492 (Sept. 21, 1976), reprinted at 122 Cong. Rec. 31860-31861 (1976), and B-145492 (May 2, 1977). The fundamental issue here, however, is the intention of Congress in enacting the 1976 Pay Act. In our view, these opinions of the GAO misconstrued the congressional design and cannot serve to overcome the clear legisla-

The district court also erred in holding that the 1977 Pay Act did not modify or repeal the Adjustment Act. The 1977 Pay Act quite plainly was intended as an amendment to the Adjustment Act. Unlike the 1976 Pay Act, the 1977 Act was not an appropriations measure at all, but rather a substantive enactment. The 1977 Act provided that the Adjustment Act increases contemplated for October 1977 "shall not take effect," and its legislative history established that its "sole purpose * * * [was] to eliminate the expected October 1977 comparability adjustment for certain individuals in the executive, legislative, and judicial branches whose rates of pay were increased earlier this year pursuant to the recommendations of the Quadrennial Commission [under the Federal Salary Act]." H.R. Rep. No. 95-458, 95th Cong., 1st Sess. 1 (1977). In these circumstances, the district court's summary conclusion that the 1977 Pay Act did not supersede the provisions of the Adjustment Act cannot be sustained.[19]

2. Assuming the Court finds that Congress intended the 1976 and 1977 Pay Acts to supersede the

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tive history set out above. Moreover, we note that Representative Coughlin, in supporting the Conference Report on the 1976 Pay Act, expressly disapproved the GAO interpretation. 122 Cong. Rec. 31893 (1976).

[19] Indeed, in the district court, appellees described the 1977 Pay Act as a "single year repealer" of the Adjustment Act, and they did not contend, as they had with the 1976 Act, that it could be construed as anything but a substantive amendment of the Adjustment Act. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 33.

provisions of the Adjustment Act, we submit that the Pay Acts did not diminish the "compensation" of Article III judges and hence did not violate the Compensation Clause.

The district court held that, upon enactment of the Adjustment Act in 1975, "the right to an annual adjustment, measured by the average adjustment in the General Schedule, became a part of a judges' [*sic*] compensation which may not be 'diminished' " (App. A, *infra*, 8a). Accordingly, the court concluded that the failure to pay the 1976 and 1977 cost-of-living increases contravened the Compensation Clause. However, by its terms, the Adjustment Act provides that cost-of-living adjustments do not become effective until "the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under [the Comparability Act] in the rates of pay under the General Schedule * * *." 28 U.S.C. 461(a) (App. E, *infra*, 26a). In turn, the annual Comparability Act adjustments take effect "as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year * * *." 5 U.S.C. 5305(a)(2) (App. E, *infra*, 28a). Because the Comparability Act increases for 1976 and 1977 became effective in October, the "beginning of the first applicable pay period" for federal judges was October 1 of each year.[20]

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[20] See affidavit of Joseph A. Leach, filed as an attachment to the Memorandum in Support of Plaintiffs' Motion for Summary Judgment.

Thus, prior to October 1, the Adjustment Act increases for judges had not taken effect, and judges had only an expectancy that they would receive a cost-of-living increase, not an entitlement or vested right to such an increase. The cost-of-living increase had not yet been earned by the judges in exchange for work performed, and indeed no services at all had been rendered for any part of the period during which the increase was to be effective.[21] Cf. *United*

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[21] The 1977 Pay Act was enacted on July 11, 1977 (91 Stat. 270), well before the Adjustment Act increases for judges would have otherwise become effective on October 1, 1977. The 1976 Pay Act was passed by the House on September 1, 1976, and by the Senate on September 8; the Conference Report was adopted by both Houses on September 22. See 122 Cong. Rec. 28881, 29377, 31863, 31896-31897 (1976). However, the bill was not signed by the President until October 1, the day that the Adjustment Act increases for judges would otherwise have taken effect, and also the day that Executive Order No. 11941 (3 C.F.R. 151 (1976 Comp.)), implementing the Adjustment Act for that year, was issued. In the court below, appellees argued that for at least a few hours on October 1, 1976, they were entitled to the increased pay that the 1976 Pay Act then purported to take from them. The general rule has long been established, however, that a statute is deemed effective from the first moment of the day on which it was enacted regardless of the precise time it was actually approved by the President. See *Lapeyre* v. *United States*, 84 U.S. (17 Wall.) 191, 198 (1872); *Central Maryland Lines, Inc.* v. *United States*, 240 F. Supp. 254, 257 (D. Md. 1965). Here, no penalty of any kind is imposed by the 1976 Pay Act, and no other reason of "substantial justice" requires departure from the general rule. See *Taylor* v. *Brown*, 147 U.S. 640, 645-646 (1893); *Louisville* v. *Savings Bank*, 104 U.S. 469, 478-479 (1881); *Burgess* v. *Salmon*, 97 U.S. 381

States v. *Larionoff*, 431 U.S. 864, 879 (1977) ("Congress may prospectively reduce the pay of [government officials], even if that reduction deprived * * * [them] of benefits they had expected to be able to earn."). Until the cost-of-living increases took effect and thus became a part of their compensation, federal judges had no unalterable right to those increases and the Compensation Clause did not preclude Congress from superseding the scheduled adjustments.[22]

(1878); *United States* v. *Casson*, 434 F.2d 415, 418-419 (D.C. Cir. 1970). Thus, the 1976 Pay Act precluded the Adjustment Act increases from taking effect, and appellees were never entitled to the 1976 cost-of-living adjustments.

[22] This result is also consistent with the history of the Compensation Clause. As originally proposed, the Clause would have prohibited increases as well as decreases in judges' compensation. See Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308, 312-313 (1976); Fellman, *The Diminution of Judicial Salaries*, 24 Iowa L. Rev. 89, 91 (1938). On Gouverneur Morris' motion, the prohibition on increases was deleted. Rosenn, *supra*, at 313; Fellman, *supra*, at 91. Madison strongly opposed this change, arguing that it would lead to judicial dependence on the legislature. Rosenn, *supra*, at 313-314; Fellman, *supra*, at 91-92. As Madison stated:

> The dependence will be less if the *increase* alone should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue compliance in the former may be felt towards the latter. [Emphasis in original.]

2 M. Farrand, *The Records of the Federal Convention of 1787* 45 (1966). Morris' motion to strike the prohibition on increases was carried, and Madison's subsequent attempts to reinstate the restriction proved unsuccessful. Rosenn, *supra*, at 314 & n.24; Fellman, *supra*, at 92. Thus, the history of

Moreover, the district court's holding—that future increases under the Adjustment Act are part of a judge's compensation protected by the Compensation Clause—would severely limit Congress' constitutional prerogatives in the setting of judicial salaries. Under the decision below, Congress would forever be precluded from modifying the law in any manner that would afford sitting Article III judges a lesser salary than they would receive pursuant to the Adjustment Act. To construe the Compensation Clause, as the district court did, to provide a perpetual guarantee that judges will continue to receive not only their present salaries but also "an annual adjustment, measured by the annual adjustment in the General Schedule" (App. A, *infra*, 8a), and thus to require that the Adjustment Act scheme be permanently frozen into law, would be a serious and wholly unjustified intrusion on congressional power having no support in the history or purpose of the Compensation Clause.[23]

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the Compensation Clause reveals that, notwithstanding concerns expressed about the effect on judicial independence, the Founding Fathers deliberately empowered Congress to raise, or to refuse to raise, the salaries of federal judges. In our view, there is no meaningful difference between the authority of Congress, consistent with the Compensation Clause, to consider but refuse to enact salary increases for Article III judges and its analogous authority to rescind an increase that has not yet gone into effect.

[23] The district court's reasoning also suggests that the Federal Salary Act would likewise be permanently frozen into law with respect to sitting federal judges.

3. In the event the Court concludes that the failure to pay the scheduled cost-of-living increases in 1976 and 1977 constituted a diminution of judges' compensation, we submit that this diminution did not offend the Compensation Clause because the 1976 and 1977 Pay Acts did not discriminate against federal judges or undermine their independence.

Although this Court has had little occasion to consider the Compensation Clause, the purpose of the Clause is well established. As the Court explained in *Evans* v. *Gore*, 253 U.S. 245, 253 (1920):

> [T]he primary purpose of the prohibition against diminution was * * *, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

The leading, and most recent, decision of this Court regarding the Compensation Clause is *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939). In *Woodrough*, the Court upheld the validity of the federal income tax statute as applied to federal judges who assumed office after the passage of the statute. Finding that the tax did not discriminate against federal judges or impair the independence of the federal judiciary, the Court rejected the contention that the statute infringed the Compensation Clause (*id.* at 281-282; footnote omitted):

> [T]he question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1, of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.[24]

Woodrough expressly overruled (307 U.S. at 283) the decision in *Miles* v. *Graham*, 268 U.S. 501 (1925),

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[24] The *Woodrough* opinion echoed Justice Holmes' dissent in *Evans* v. *Gore* that requiring "a man to pay the taxes that all other men have to pay cannot possibly be used as an instrument to attack his independence as a judge" (253 U.S. at 265).

which had invalidated, under the Compensation Clause, the application of the income tax to federal judges appointed after the inception of the tax. *Woodrough* also criticized the decision in *Evans* v. *Gore*, *supra*, which had overturned the federal income tax statute as applied to federal judges who took office prior to enactment of the tax. The Court in *Woodrough* noted that *Evans* had "met wide and steadily growing disfavor from legal scholarship and professional opinion * * * [and] was rejected by most of the courts before whom the matter came after that decision" (307 U.S. at 281; footnotes omitted). These observations by the Court, as well as the Court's basic analysis, show that the decision in *Woodrough* repudiated *Evans'* central premise that the Compensation Clause is "directed against all diminution, whether for one purpose or another * * *" (253 U.S. at 255).[25]

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[25] Justice Butler, in his dissent in *Woodrough*, recognized that the majority's decision "destroy[s] the decision in *Evans* v. *Gore*" (307 U.S. at 297) and that "the Court now repudiates its earlier decisions" in *Evans* v. *Gore* and *Miles* v. *Graham* (307 U.S. at 299). Lower federal courts and commentators have also read *Woodrough* as disapproving the *Evans'* holding. See, *e.g.*, *Atkins* v. *United States*, 556 F.2d 1028, 1043-1045, 1047-1048, 1051 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978); *Magruder* v. *Brown*, 106 F.2d 428, 430, 431 (4th Cir. 1939), cert. denied, 308 U.S. 624 (1940); Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308, 332-333 n.94 (1976); 53 Harv. L. Rev. 137 (1939); 15 Ind. L. J. 159, 161 n.11 (1939); 13 S. Cal. L. Rev. 131, 132 (1939). And in *Baker* v. *Commissioner*, 149 F.2d 342, 344 (4th Cir.), cert. denied, 326 U.S. 746 (1945), the court stated that under

In our view, *Woodrough* sets forth the governing principles under the Compensation Clause. Applying those principles here, it is evident that the 1976 and 1977 Pay Acts did not violate the Constitution. The Pay Acts did not discriminate against federal judges, but rather were equally applicable to a broad range of ranking government officials, including the Vice President, Cabinet officers and Executive Schedule personnel, and members of Congress. Similarly, it cannot be said that the Pay Acts, in either purpose or effect, made "inroads upon the independence of judges." [26] Rather, the 1976 Pay Act was part of the congressional effort to be held accountable "on [the] public record" when salaries are increased for top government officers (122 Cong. Rec. 28872 (1976) (remarks of Rep. Shipley)) and to "strike a blow for economy in Government" by eliminating the automatic cost-of-living salary increases for these officials in 1976 (*id.* at 28877 (remarks of Rep. Udall)). The 1977 Pay Act was specifically designed to deal with the "anamolous situation" in which these ranking government officials, having already received a sub-

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Woodrough a judge could constitutionally be required to pay higher taxes as part of a general increase in the tax system, a conclusion that implicitly acknowledges that the *Evans* analysis was discredited by *Woodrough*.

[26] Appellees did not allege in the district court that the Pay Acts discriminated against federal judges or constituted an attack on their independence, and there is no evidence whatever that the Acts were prompted by Congress' antagonism against the judiciary or its displeasure with any particular federal judges or judicial decisions.

stantial pay raise in March 1977 pursuant to the Federal Salary Act, would have gotten a second raise in the same calendar year if the Adjustment Act increases scheduled for October 1977 had been allowed to take effect (H.R. Rep. No. 95-458, 95th Cong., 1st Sess. 2 (1977)). We submit that nothing in the Compensation Clause precludes Congress from including federal judges in such legitimate, nondiscriminatory legislation.[27]

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[27] The decisions in *O'Donoghue* v. *United States*, 289 U.S. 516 (1933), and *Booth* v. *United States*, 291 U.S. 339 (1934), do not lead to a different conclusion. In *O'Donoughue*, the Court held that the courts of the District of Columbia were established under Article III of the Constitution and thus that the judges of those courts were within the statutory provision exempting from pay reductions during the Depression all "judges whose compensation may not, under the Constitution, be diminished during their continuance in office." The Court in *O'Donoghue* expressly limited its decision to the statutory question and disclaimed resolution of any constitutional issues under the Compensation Clause (289 U.S. at 529); in particular, the Court did not decide whether, in the absence of the statutory exemption, Congress could constitutionally have applied the salary reductions to Article III judges. In *Booth*, the Court held, as conceded by the Solicitor General, that a reduction after an increase in a judge's salary, even though not a reduction below the salary in effect at the time of the judge's appointment to the bench, is a reduction in compensation (29 U.S. at 352). We do not challenge this holding here. Hence, if the 1976 and 1977 Pay Acts were otherwise unconstitutional, they cannot be saved simply because the salaries nevertheless remain above the levels that existed at the time the judges assumed office. However, *Booth* does not bear on the question whether the nondiscriminatory failure to pay cost-of-living increases violates the Compensation Clause. Moreover, both *O'Donoghue* and *Booth* were decided prior to this Court's decision in *O'Malley* v. *Woodrough, supra.*

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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Attorney

DECEMBER 1979

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* The Solicitor General is disqualified in this case.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 420

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE B. HARRIS, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed August 29, 1979]

ORDER

Plaintiffs, thirteen federal district court judges,[1] have sued the Government to recover compensation allegedly due them for their services as federal judges during part or all of the period commencing October 1, 1976 and continuing to March 1, 1977.

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[1] The named plaintiffs represent members of a class comprised of 600 judges from the United States District Court for the Eastern District of New York, the United States District Court for the Northern District of California, the United States District Court for the Northern District of Illinois, and the United States District Court for the Eastern District of Louisiana.

Jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1346(a)(2).

In this motion, we must decide whether the Compensation Clause of Article III § 1 of the United States Constitution has been violated by Congress' refusal to pay plaintiffs a cost-of-living adjustment for the salary periods commencing October 1, 1976 and October 1, 1977. Because we find that Congress' refusal to pay plaintiffs a cost-of-living adjustment directly diminished the compensation to which plaintiffs were entitled, we conclude that the Compensation Clause has been violated and, accordingly, we grant plaintiffs' motion for summary judgment.

The facts underlying plaintiffs' claim in the instant case are as follows. In 1975, Congress amended Section 135 of Title 28,[2] the section which defines the salary component of a federal judge's compensation, to provide that:

> Each judge of a district court of the United States shall receive a salary at our annual rate determined under Section 225 of the Federal Salary Act of 1967 . . . as adjusted by Section 461 of this title.

In August, 1975, Section 461 of Title 28, the Executive Salary Cost-of-Living Adjustment Act (the "Adjustment Act"), was passed, providing that salaries of judges and other executive level employees

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[2] Prior to the 1975 Amendment Section 135 provided that "(e)ach judge of a district court of the United States shall receive a salary of $30,000 a year." The $30,000 salary was increased to $40,000 by operation of the Federal Salary Act of 1967. 2 U.S.C. § 351.

shall include an annual adjustment measured by the average percentage adjustment in the General Schedule as determined under the Federal Pay Comparability Act of 1970 (the "Comparability Act"), 5 U.S.C. § 5305 et. seq.[3]

On October 6, 1975, the President issued Executive Order No. 11883 adjusting General Schedule and Executive Schedule level salaries by an average of five percent, thus setting the salary of district judges at $42,000 effective October 1, 1975.

On October 1, 1976, the annual rates of pay for General Schedule employes were increased by an average of 4.8% in accordance with the applicable provision of the Comparability Act of 1970. Accordingly, on October 1, 1976 pursuant to the applicable provisions of the Adjustment Act, the President issued Executive Order No. 11941 adjusting all Executive Schedule salaries, which includes those of federal judges, by approximately 4.8%. The annual salary of circuit judges was thereby established at $46,800; the annual salary of district judges was thereby established at $44,000 effective October 1, 1976.[4]

Also on October 1, 1976, Congress passed the Legislative Appropriations Act of 1977, P.L. 94-440 (the "Appropriations Act"). Among other things, this

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[3] The Federal Pay Comparability Act provides a mechanism under which the vast majority of federal employees have received each year since 1970, a pay adjustment approximating the rise in the cost-of-living in the private sector.

[4] Circuit judges include judges of the Court of Claims and judges of the Court of Customs and Patent Appeals. District judges include judges of the United States Customs Court.

Act prohibited the use of funds to pay the salaries of Executive level employees, which includes federal district court judges, at a rate which exceeded the annual salary in effect on September 30, 1976. As a result, the 4.8% cost-of-living adjustment established by Executive Order No. 11941 was not paid to plaintiffs.

On July 11, 1977, Congress passed P.L. 95-66 providing that any adjustment in Executive Salary levels, which would ordinarily go into effect on October 1, 1977, "shall not take effect."

On September 28, 1977, the President issued Executive Order No. 12010, pursuant to the Comparability Act, increasing by an average of 7.2% the rates of pay of General Schedule employees. The Executive Order excluded a similar adjustment in the rate of pay applicable to federal judges and other Executive Schedule employees due to the limitation imposed under P.L. 95-66.

Plaintiffs' complaint contains two counts. Count I alleges that the Legislative Branch Appropriations Act of 1977, P.L. 94-440, had no effect on the lawful rates of pay to which the judges' became entitled under Executive Order No. 11941 and, as a result, Congress' failure to pay plaintiffs a cost-of-living adjustment for the period commencing October 1, 1976 violates the Compensation Clause. Additionally, plaintiffs' maintain that even if the Appropriations Act had the effect of redefining the applicable salary levels, such action by Congress nevertheless directly diminishes their compensation in violation of the Compensation Clause.

Count II of plaintiffs' complaint alleges that P.L. 95-66 also unconstitutionally diminished the plaintiffs' compensation insofar as it purports to preclude payment of the salary adjustment commencing on October 1, 1977.

In response to these contentions, defendant filed a motion for judgment on the pleadings pursuant to Rule 12(c), Federal Rules of Civil Procedure, contending that both Public Law 94-440, the Appropriations Act of 1977, attacked in Count I and Public Law 95-66 attacked in Count II of plaintiffs' complaint suspended the operation of the Adjustment Act so that the cost-of-living increases did not become a part of judicial compensation. Additionally, defendant argues that even if the increases had become part of the plantiffs' compensation, the compensation was not diminished in violation of the Compensation Clause because neither the Appropriations Act nor Public Law 95-66 had the purpose or effect of discriminatorily attacking the independence of judges through financial means. Accordingly, argues defendant, the plantiffs have failed to state a cause of action and, therefore, judgment on the pleadings should be awarded in defendant's favor.

Plaintiffs, in turn, filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. Because this court has considered affidavits submitted by plaintiffs in rulings on these motions, we have considered the parties allegations in accordance with the rules governing summary judgments. See, Rule 12(b)(6) and (c), Federal Rules

of Civil Procedure. The Supreme Court has stated that summary judgment is appropriate where the court finds that on the basis of the pleadings and affidavits, no genuine issue of any material fact is presented and the moving party is entitled to judgment as a matter of law. See, e.g., *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944) and Rule 56(c), Federal Rules of Civil Procedure.

In the instant case, the facts are not in dispute. The government does not dispute that plaintiffs were denied the cost-of-living adjustment provided for under 28 U.S.C. §§ 135, 461. Rather, the parties disagreement centers around the question whether the cost-of-living adjustment constitutes part of the "compensation" to which the plaintiff-judges are entitled. Plaintiff asserts that this adjustment is part of the compensation to which they are entitled by law, and consequently, Congress' refusal to pay those adjustments violates the prohibition in the Compensation Clause which prohibits the diminishment of a judge's salary during his continuance in office.

Defendant maintains that the adjustment does not comprise part of the compensation to which judges are entitled, and, therefore, Congress' refusal to pay plaintiffs these adjustments does not constitute a violation of the Compensation Clause. The government's position rests, however, on several unsupportable and unpersuasive grounds. First, the government argues that the cost-of-living adjustment does not become part of the compensation to which plaintiffs are entitled until the percentage by which the

salary shall be adjusted is declared. Defendant maintains that until this percentage is declared and the statutory process is set into motion and completed, Congress has not definitely declared what sum a judge shall receive as compensation. Therefore, maintains defendant, prior to the time when the percentage is fixed, Congress may abort or suspend the process so as to bar judges from receiving a cost-of-living adjustment.

Second, the government maintains that even if Congress' action constitutes a diminution of plaintiffs' compensation, the diminishment in the instant case does not violate the Compensation Clause because it is not a diminishment which discriminates against judges in such a way as to make inroads upon their independence.

This court finds that the cost-of-living adjustment provided for under 28 U.S.C. § 135 constitutes a part of the compensation to which plaintiffs are entitled during their terms as judges, and consequently, Congress' refusal to pay those adjustments violates the Compensation Clause.

The Compensation Clause of Article III, Section 1 of the United States Constitution provides:

> The Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Plaintiffs submit that once the Executive Salary Cost-of-Living Act granting judges "a salary at an

annual rate determined under Section 225 of the . . . Salary Act . . . as adjusted by Section 461 of this Title", "The Adjustment Act", became law, the right to an annual adjustment, measured by the average adjustment in the General Schedule, became a part of a judges' [*sic*] compensation which may not be "diminished." We agree.

In *Miles* v. *Graham*, 268 U.S. 501, 508-509 (1925), the Supreme Court defined the constitutional term "compensation" stating that:

> The words and history of the clause indicate that the purpose was to impose upon Congress *the duty definitely to declare what sum shall be received* by each judge out of the public funds and the times for payment. When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.

Emphasis Supplied. See also, *Evans* v. *Gore*, 252 U.S. 245 (1920), and *Atkins* v. *United States*, 556 F.2d 1028, 1044 (Ct. Cl. 1977).

Accordingly, when in 1975 Congress unequivocally declared that the compensation which "judges of a district court shall receive" shall include "an annual rate determined under Section 225 of the Federal Salary Act of 1967 . . . *as adjusted by Section 461* . . .", Congress complied with its duty to definitely declare what sum shall be received by each judge out of the public funds. Consequently, the annual salary provided under Section 225 "as adjusted by Section

461" became the compensation for the plaintiffs which was protected against dimunition.

This conclusion is supported by a reading of both the history of the constitutional provision and the case law interpreting that provision. Contrary to the defendant's assertion, the case law does not state that a definite dollar amount must be declared, but rather, that Congress must specifically provide for the compensation to be paid to each judge. Once Congress has statutorily provided for the compensation to which judges shall be entitled, the compensation specified becomes protected against diminution during the judges' continuation in office. Whether Congress has specified a dollar amount which judges shall receive, or has provided a statutory method for calculating the amount a judge shall receive is immaterial. What is significant is the specific provision for judicial compensation, a provision which can then become the guarantee of compensation. *United States* v. *More*, 3 Cranch 160 (1803) is a case on point. In *More*, the Circuit Court of Columbia held that an Act of Congress abolishing fees charged by justices of the peace in the District of Columbia could not be invoked as to those justices who took office at a time when such fees were lawful. Central to the courts decision is the recognition that the compensation to which justices of the peace were entitled was the compensation provided for by law at the time the justices assumed office. Moreover, the fact that the amount of the fee was not determined until the completion of a judges' service was not material.

> The Act of Congress of the 27th of February, 1801, which constitutes the office of justice of peace . . . ascertains the compensation which they shall have for their services in holding their courts . . . This Compensation is given in the form of fees, payable when the services are rendered . . . If his compensation has once been fixed by law, a subsequent law for diminishing that compensation (a fortiori for abolishing it) cannot affect that justice of the peace during his continuance in office, . . .

Clearly, on the basis of the *More* case alone, the only supportable conclusion in the instant case is that Congress' attempt to eliminate or avoid the provision for a cost-of-living adjustment provided for under Title 28, U.S.C. §§ 135, 461 as a component of plaintiffs' compensation is unconstitutional.

However, this result is mandated by subsequent Supreme Court cases construing the meaning of Article III § 1.

Evans v. *Gore*, 253 U.S. 245 (1920) enunciated principles governing the application of the Compensation Clause.[5] The plaintiff in *Evans* had been a district judge since 1899. In 1919 the Act of February 24, 1919, 40 Stat. 1062, fixed his net income for the first time. The Court held that Article III § 1 prevented Congress from imposing an income tax on the salary of judges despite the fact that the tax

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[5] While *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939) overruled *Miles* v. *Graham*, 268 U.S. 501 (1925) and, consequently, overruled a good deal of *Evans*, the Supreme Court's enunciation of principles concerning the meaning of the Compensation Clause continue to be valid. *See Atkins* v. *U.S.*, 556 F.2d 1028, 1043 (Ct. Cl. 1977).

applied uniformly to all individuals. Noting that the prohibition in Article III § 1 is general, containing no excepting words and applying to all dimunitions whether direct, indirect or evasive, the court held that all dimunitions,

> . . . which by their necessary operation and effect withhold or take from the judge a part of that which he has been promised by law for his services must be regarded as within the prohibition.

253 U.S. at 254-255. In the instant case, the plaintiff judges were promised by law that their compensation would include "an annual salary" "as adjusted by" the cost-of-living adjustment provided for in 28 U.S.C. § 461. Accordingly, Congress' effort to withhold or take from the plaintiffs that component of their compensation comprised of a cost-of-living adjustment falls within the prohibition of the Compensation Clause.

After *Evans*, the Article III § 1 prohibition was applied to an income tax law enacted prior to a judge assuming office, and as a result the judge could not be taxed. *Miles* v. *Graham*, 268 U.S. 501, 509 (1925).

However, in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), the Supreme Court made it clear that the prohibition in the Compensation Clause applied only to dimunitions effected during a judge's term in office. Critical to the Court's decision was the fact that Judge Woodrough had been appointed to his position *after* the effective date of the applicable tax law, § 22 of the Revenue Act of 1932, 47 Stat. 169, 178. Consequently, the judge would be required to pay the tax.

The court took care to note that, though Judge Woodrough's income was being taxed pursuant to the Revenue Act of 1936 (49 Stat. 1648, 1657),

> ". . . the power of Congress to include Judge Woodrough's salary as a circuit judge in his gross income must be judged on the basis of the validity of (the 1932 Act) . . . (f)or it was . . . (the 1932 Act) that gave notice to all judges thereafter appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes."

307 U.S. at 280. The critical point which emerges from these cases is clear. In each instance where Congress has attempted to effect a change in the compensation to which an Article III judge is entitled either by altering, amending, or repealing the statutory provision providing for the judicial compensation existing at the time the plaintiff judge assumed office, the Supreme Court has declared Congress' actions unconstitutional where it has resulted in a diminishment in the amount of compensation to which the judge was previously entitled. While such a change would be permitted if it were to increase a judge's salary, because of the Compensation Clause, Congress may not effect an alteration, amendment, or change that would diminish what the judge was entitled to when he assumed office. The reasoning behind this prohibition is clearly demonstrated in the history of Article III § 1.

> The provision for the permanent support of the judges is well calculated, in addition to the ten-

> ure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station.

1 Kent Com. 294.

The underlying import of Article III § 1 reflects the Founding Fathers concern that the judges be ensured the same salary throughout their tenure as that provided for by law when they assumed office. With a guaranteed salary established, the independence of the bench, a bench which is not occupied by "men who depend upon the smiles of the crown for their daily bread," will be better insured. Chief Justice Taney discussed the importance of an independent judiciary stating:

> Its duties and powers are . . . of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such inference, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation. Language could not be more plain than that used in the Constitution.

157 U.S. 701, 702.

The government's assertion that the cost-of-living adjustment provided for in Title 28 U.S.C. § 135 is not a part of a judge's compensation until the per-

centage amount of the adjustment is declared miscontrues entirely both the language and the history of the Compensation Clause.

Defendants arguments lead to two results specifically prohibited by the Compensation Clause. First, this argument suggests that Congress has not fulfilled its duty to specifically declare what sum a judge shall receive during his continuance in office so that he is on notice when he assumes his position. However, as the case law makes clear, the purpose of the Compensation Clause was to impose this duty upon Congress so that the judiciary would not be dependent upon the smiles of the crown for their daily bread. *Miles* v. *Graham, supra.* Second, by contending that Congress may suspend the operation of the cost-of-living adjustment because it is dependent upon a complex statutory machinery, defendants are also suggesting that the annual salary component of Title 28 U.S.C. § 135 could conceivably be withheld because one must also look to another statutory section to determine what the stated annual salary shall be. This argument is tantamount to the suggestion that an employer need not honor the cost-of-living adjustment called for in a union-wage agreement because the exact amount of the adjustment was not known when the provision was adopted, a contention no labor lawyer would seriously advance.

The Compensation Clause's prohibition is not concerned with the method selected by Congress for determining judicial compensation. Rather, its concern is that once the method is selected it not be

altered to diminish the compensation to which judges are entitled. Contrary to the government's assertion, Article III § 1 specifically intends to restrict and limit Congress' power over judicial compensation.

Moreover, if Congress had not intended that the cost-of-living adjustment be a part of the compensation to which plaintiffs were entitled, there would be no reason for the 1975 amendment which included this component provision in § 135, Title 28 U.S.C. for the first time, where previously there had been only a stated annual salary. In fact, *Atkins* v. *U.S.*, 556 F.2d 1028 (Ct.Cl. 1977), a case heavily relied upon by defendants, was concerned with a claim similar to that made by plaintiffs in the instant case. However, central to the court's decision in *Atkins* that there was no violation of the Compensation Clause was the fact that there was no statute providing for a cost-of-living adjustment.

In *Atkins*, plaintiffs claimed "that the failure of Congress to raise their salaries by more than five percent since 1969, coupled with severe economic inflation in the interim" was a violation of the Compensation Clause because the "real value" of purchasing power of a judge's unadjusted compensation had decreased.

In reaching its conclusion that this failure by Congress to adjust the judge's compensation did not constitute the prohibited diminishment contemplated in Article III § 1, the Court distinguished between direct dimunition and indirect dimunitions. A clear understanding of the distinctions made by the *Atkins* court

between direct and indirect dimunitions is critical because it serves to directly undermine the defendants second contention that the dimunition alleged in the instant case does not violate the Compensation Clause's prohibition because it does not discriminate against judges in such as to make inroads on their independence.

The *Atkins* court specifically stated that where, as in the instant case, there is a direct dimunition because Congress attempts to alter or avoid the payment of a compensation provided for by law, the clause is unequivocal in its proscription. However, where an indirect dimunition occurs the court, while explicitly recognizing that a cause of action may be stated, required that such dimunition be the product of a demonstrable discriminatory attack upon the independence of the judiciary in order to support the relief requested. In *Atkins*, the court found that Congress' failure to raise judicial salaries in the face of uncontrolled inflation resulted in an indirect dimunition, but was not violative of the Compensation Clause because it could not be considered an assault upon the independence of the judiciary.

In the instant case, Congress specifically provided that a judge's compensation shall be an annual salary as adjusted by § 461, the Adjustment Act. Consequently, Congress' attempt to avoid, repeal, or suspend the operation of this part of a judge's compensation amounts to a direct dimunition of the plaintiff judges' compensation in violation of the Compensation Clause.

At this point it should be noted that a determination that the cost-of-living adjustment for any year would be 0% could conceivably be permissible. But, the instant attempt to directly diminish plaintiffs' compensation by indirect means cannot be tolerated. In fact, Congress itself has recognized this limitation on their power to effect judicial salaries. In *O'Donoghue* v. *U.S.*, 289 U.S. 516 (1932), the statute under consideration was the Legislative Appropriation Act of June 30, 1932. The Act provided in pertinent part for a reduction in the rate of compensation during the fiscal year ending June 30, 1933, for "all judges (except whose compensation may not, under the Constitution, be diminished during their continuance in office) . . . ." The issue in *O'Donoghue* was whether the plaintiff judge was appointed pursuant to Article III § 1, a fact not in dispute in the instant case. The Court in *O'Donoghue* noted that:

> In framing the Constitution therefore, the power to diminish the compensation of the federal judges was explicitly denied, in order, *inter alia*, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the persons, would otherwise hold the power to reduce their means of support.

289 U.S. 531. In fact, in the instant case, Congress has explicitly recognized this same limitation in their powers to effect a judge's salary during his continuance in office. Section (b) of the Adjustment Act, the very Act which is in dispute, provides that the pay

adjustment provision of the Act "shall not apply to the extent it would reduce the salary of an individual whose compensation may not, under § 1 of Article III be diminished during such individual's continuance in office."

Moreover, it should be noted that Congress' failure to appropriate funds for the October 1, 1976 adjustment does not preclude recovery for compensation otherwise due. In *New York Airways, Inc.* v. *U.S.*, 369 F.2d 743 (Ct. Cl. 1966), the defendants contended that plaintiffs could not be paid because of Congress' deliberate action of appropriating less than the amount required to meet plaintiff's payments. The court rejected this argument stating:

> It has long been established that the mere failure of Congress to appropriate funds without words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a governmental obligation created by statute.

369 F.2d at 748. See also, *State of Louisiana* v. *Weinberger*, 369 F.Supp. 856, 860 (E.D. La. 1973); *Concerned Residents of Buck Hills Falls* v. *Grant*, 537 F.2d 29 (3rd Cir. 1976). Neither P.L. 94-440 nor P.L. 95-66 contains language which expressly or impliedly indicates that Congress was modifying or repealing the provisions of the Adjustment Act.

Nevertheless, in spite of the government's assertions as to the intended effect of P.L. 94-440 and 95-66, the fact remains that as to the plaintiff judges

Congress is powerless to effect a change which diminishes the compensation provided for by statute, and promised to plaintiffs, when they assumed office. For these reasons, plaintiffs motion for summary judgment is granted.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated: August 29, 1979

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action File No. 78C 420

HUBERT L. WILL, ET AL

vs.

U.S.A.

[Filed September 24, 1979]

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Stanley J. Roszkowski, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that a judgment is hereby entered on Count I of the Amended Complaint for plaintiffs and each member of the class defined in Count I for the amount of unpaid compensation due for the period October 1, 1976 through March 1, 1977, said amount being that amount which should have been paid under the provisions of the Executive Salary Cost-of-Living Act, P. L. 94-82, 5 U. S. C. 5318, and 28 U. S. C. 461 as a salary adjustment effective October 1, 1976.

It is further ordered that a judgment shall be and hereby is entered on Count II of the Amended Complaint for plaintiffs and each member of the class defind [*sic*] in Count II for the amount of unpaid compensation due for the period October 1, 1977 to the date of this judgment order pursuant to Executive Salary Cost of Living Act, P. L. 94-82, 5 U. S. C. 5318 and 28 U. S. C. 461 as a salary adjustment effective October 1, 1977.

It is further ordered that plaintiffs and plaintiff classes shall recover the amounts as set forth above from defendant with interest thereon as provided by law from this date.

Dated at Chicago, Illinois, this 24th day of September, 1979.

H. Stuart Cunningham
Clerk of Court

By /s/ H. R. Cheng

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil No. 78 C 420

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE B. HARRIS, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed September 26, 1979]

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. 1252, the defendant United States of America hereby appeals to the Supreme Court of the United States from the order granting plaintiffs' motion for summary judgment entered August 29, 1979.

Respectfully submitted,

ALICE DANIEL
Acting Assistant
Attorney General

/s/ Anthony J. Steinmeyer
ANTHONY J. STEINMEYER

/s/ David M. Glass
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Attorneys for Defendant

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil No. 78 C 420

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE B. HARRIS, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed October 17, 1979]

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. 1252, the defendant United States of America hereby appeals to the Supreme Court of the United States from the judgment entered in this action on September 24, 1979.

Respectfully submitted,

ALICE DANIEL
Acting Assistant
Attorney General

/s/ Anthony J. Steinmeyer
ANTHONY J. STEINMEYER

/s/ David M. Glass
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Attorneys for Defendant

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause of the United States Constitution, Article III, Section 1, provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. 135 provides:

> Each judge of a district court of the United States shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

28 U.S.C. 461 provides:

> (a) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100) equal to the percentage of such salary rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under such section 5305) of the

adjustments in the rates of pay under such Schedule.

(b) Subsection (a) shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office.

5 U.S.C. 5305 provides in pertinent part:

(a) In order to carry out the policy stated in section 5301 of this title, the President shall—

(1) direct such agent as he considers appropriate to prepare and submit to him annually, after considering such views and recommendations as may be submitted under the provisions of subsection (b) of this section, a report that—

(A) compares the rates of pay of the statutory pay systems with the rates of pay for the same levels of work in private enterprise as determined on the basis of appropriate annual surveys that shall be conducted by the Bureau of Labor Statistics;

(B) makes recommendation for appropriate adjustments in rates of pay; and

(C) includes the views and recommendations submitted under the provisions of subsection (b) of this section;

(2) after considering the report of his agent and the findings and recommendations of the Advisory Committee on Federal Pay

reported to him under section 5306(b)(3) of this title, adjust the rates of pay of each statutory pay system in accordance with the principles under section 5301(a) of this title, effective as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year; and

(3) transmit to Congress a report of the pay adjustment, together with a copy of the report submitted to him by his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(b) In carrying out its functions under subsection (a)(1) of this section, the President's agent shall—

(1) establish a Federal Employees Pay Council of 5 members who shall not be deemed to be employees of the Government of the United States by reason of appointment to the Council and shall not receive pay by reason of service as members of the Council, who shall be representatives of employee organizations which represent substantial numbers of employees under the statutory pay systems, and who shall be selected with due consideration to such factors as the relative numbers of employees represented by the various organizations, but no more than

3 members of the Council at any one time shall be from a single employee organization, council, federation, alliance, association, or affiliation of employee organizations;

(2) provide for meetings with the Federal Employees Pay Council and give thorough consideration to the views and recommendations of the Council and the individual views and recommendations, if any, of the members of the Council regarding—

(A) the coverage of the annual survey conducted by the Bureau of Labor Statistics under subsection (a)(1) of this section (including, but not limited to, the occupations, establishment sizes, industries, and geographical areas to be surveyed);

(B) the process of comparing that rates of pay of the statutory pay systems with rates of pay for the same levels of work in private enterprise; and

(C) the adjustments in the rates of pay of the statutory pay systems that should be made to achieve comparability between those rates and the rates of pay for the same levels of work in private enterprise;

(3) give thorough consideration to the views and recommendations of employee organizations not represented on the Federal Employees Pay Council regarding the subjects in paragraph (2)(A)-(C) of this subsection; and

(4) include in its report to the President the views and recommendations submitted

as provided in this subsection by the Federal Employees Pay Council, by any member of that Council, and by employee organizations not represented on that Council.

(c) (1) If, because of national emergency or economic conditions affecting the general welfare, the President should, in any year, consider it inappropriate to make the pay adjustment required by subsection (a) of this section, he shall prepare and transmit to Congress before September 1 of that year such alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefor, in lieu of the pay adjustments required by subsection (a) of this section. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(2) An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after October 1 of the applicable year and continues in effect unless, before the end of the first period of 30 calendar days of continuous session of Congress after the date on which the alternative plan is transmitted, either House adopts a resolution disapproving the alternative plan so recommended and submitted, in which case the pay adjustments for the statutory pay systems shall be made effective as provided by subsection (m) of this section. The continuity of a session is broken only by an adjournment of the Congress sine die,

and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 30-day period.

* * * * *

(m) If either House adopts a resolution disapproving an alternative plan submitted under subsection (c) of this section, the President shall take action required by paragraphs (2) and (3) of subsection (a) of this section and adjust the rates of pay of the statutory pay systems effective as of the beginning of the first applicable pay period commencing on or after the date on which the resolution is adopted, or on or after October 1, whichever is later.

Title II of the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, 1446 provides in pertinent part:

Provided, That none of the funds contained in this Act shall be used to increase salaries of Members of the House of Representatives pursuant to section 204a of Public Law 94-82 in excess of the salary rate in effect on September 30, 1976, for such position or officer. No part of the funds appropriated in this Act or any other Act shall be used to pay the salary of an individual in a position or office referred to in section 225(f) of the Federal Salary Act of 1967, as amended (2 U.S.C. 356), including a Delegate to the House of Representatives, at a rate which exceeds the salary rate in effect on September 30, 1976, for such position or office except increases submitted by the President pursuant to section 225 of the Federal Salary Act of 1967.

Public Law No. 95-66, 91 Stat. 270, provides:

> That, the first adjustment which, but for this Act, would be made after the date of enactment of this Act under the following provisions of law in the salary or rate of pay of positions or individuals to which such provisions apply, shall not take effect:
>
> (1) the second sentence of section 104 of title 3, United States Code, relating to comparability adjustments in the salary of the Vice President of the United States;
>
> (2) paragraph (2) of section 601(a) of the Legislative Reorganization Act of 1946 (2 U.S.C. 31), relating to comparability adjustments in the annual rate of pay of Members of Congress;
>
> (3) section 461 of title 28, United States Code, relating to comparability adjustments in the salary and rate of pay of justices, judges, commissioners, and referees; and
>
> (4) section 5318 of title 5, United States Code, relating to comparability adjustments in the annual rate of pay for positions in the Executive Schedule.

28 U.S.C. 2109 provides:

> If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc

or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 304350 114

Supreme Court, U.S.
FILED
JUN 27 1980
MICHAEL RODAK, JR., CLERK

JOINT APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-983

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

No. 79-1689

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENTS FILED DECEMBER 21, 1979 AND APRIL 25, 1980
JURISDICTION POSTPONED TO HEARING ON MERITS FEBRUARY 19, 1980 AND JUNE 16, 1980

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-983

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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[1]The district court's order and judgment are printed at Appendices A and B in the Jurisdictional Statement.

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1689

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-983

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

RELEVANT DOCKET ENTRIES

JUDGE ROSZKOWSKI

CORRECTED AMENDED COMPLAINT

78 C 420

(D-1) THE UNITED STATES OF AMERICA

(P-1) WILL, HUBERT L. (P-2) BARTELS, JOHN R. (P-3) BRAMWELL, HENRY (P-4) BURKE, LLOYD H. (P-5) CAMPBELL, WILLAIM J.; FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE B. HARRIS, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, AND SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated.

ATTORNEYS:

DEFENDANT
BARBARA ALLEN BABCOCK
Asst Atty General

ANTHONY J. STEINMEYER

LAWRENCE J. JENSEN
Department of Justice
10th and Pennsylvania Ave NW
Washington, D. C. 20530
202-739 3383

PLAINTIFF
KEVIN M. FORDE
RICHARD J. PRENDERGAST
111 W. Washington #2025
60602 726-5015

2/7/78	Filed Complaint and three copies.
2/7/78	Filed Civil Cover Sheet.
2/7/78	Filed Appearance of plaintiffs' attorneys with Affidavits re Rule 39.
2/7/78	Issued summons and three copies with three copies of the Complaint.
2/22/78	Summons returned from U. S. Marshal for failure to file USM-285.
2/23/79	Filed copy of letter addressed to Chief, General Litigation Section Civil Division, Department of Justice, Washington, D.C. from U. S. Attorney, N/D Illinois requesting recusal from participation in this cause.
2/28/78	Enter order dated February 10, 1978 (a) Transfer of Case to the Executive Committee for Reassignment. The above captioned cause is currently pending on my calendar. I recommend to the Executive Committee that this case be reassigned by lot to another judge of this Court. The reasons for my recommendation are indicated

on the reverse of this form. Marshall. J.
(b) It is hereby Ordered that the Clerk reassign the above-captioned matter by lot to either Judge Bua or Judge Roszkowski, as such judges are the only members of this Court not potentially members of the class involved in these proceedings.
FOR THE EXECUTIVE COMMITTEE
James B. Parsons, CJ. Notices mailed 2/28/78

3/17/78 Filed plaintiff's Notice of Filing.

3/17/78 Filed Amended Complaint—new plaintiffs added.

4/10/78 Filed Executive Order: Approval of the Executive Committee is given to Honorable Stanley J. Roszkowski to conduct any or all of the proceedings in Bartels. et al v. United States of America—78 C 420 outside the Everett McKinley Dirksen Building at Chicago, Illinois, in, to-wit, the United States Courthouse at Rockford, Illinois in the Western Division of the Northern District of Illinois, ENTER For the Executive Committee JAMES B. PARSONS, Chief Judge.

4/10/78 Filed defendant's Answer.

4/25/78 Filed plaintiff's Notice of Motion; Plaintiffs' Motion for Class Determination.

4/26/78 Enter order dated April 25, 1978: Plaintiffs shall file their supporting memorandum on or before May 1, 1978; defendant shall file its answering memorandum on or before May 11, 1978; plaintiffs may respond within five (5) days thereafter. Roszkowski, J. Notices mailed 4/26/78

5/1/78 Filed Plaintiffs' Memorandum in Support of Their Motion for Class Determination.

5/16/78 Filed Plaintiffs' Reply Memorandum in Sup-

port of Their Motion for Class Determination.

5/16/78 Filed Defendant's Response to Plaintiffs' Motion for Class Determination.

6/5/78 Filed defendants' Motion for Judgment on the Pleadings.

6/8/78 Enter order dated June 6, 1978: Plaintiffs are directed to respond to defendant's motion for judgment on the pleadings and memorandum in support by June 22, 1978. Defendant's reply to the response to be filed by July 7, 1978.—Roszkowski, J.
Notices mailed 6/8/79

6/23/78 Enter order dated June 22, 1978: By stipulation of the parties:
1. Defendant is granted leave to file Motion for Judgment on the pleadings and supporting memoranda in excess of 15 pages.
2. Plaintiffs are given until June 23, 1978 to file Motion for Summary Judgment.
3. Plaintiffs given until July 6, 1978 to file memorandum in support of their motion for summary judgment and opposition to the defendant's Motion for summary judgment on the pleadings.
4. Defendant is given until August 7, 1978 to file its opposition to plaintiffs' motion for summary judgment and reply brief.
5. Plaintiffs have until August 22, 1978 to file reply brief in support of their motion for summary judgment or judgment on the pleadings.
6. The parties are granted leave to file said briefs in excess of 15 pages (DRAFT).
Roszkowski, J.
Notices mailed 6/23/78

6/23/78 Filed Plaintiff's Motion for Summary Judgment.

7/10/78	Enter order dated July 7, 1978: Per stipulation of the parties, IT IS ORDERED: 1. Plaintiff's brief in support of their motion for Summary Judgment or judgment on the pleadings and their opposition to the Motion of defendants for Judgment on the pleadings may be filed on or before July 11, 1978. 2. Defendant shall have 30 days thereafter to file its brief in opposition to Plaintiffs' Motion for Summary Judgment or Judgment on the pleadings and its reply brief in support of its motion for judgment on the pleadings. 3. Plaintiffs shall have 15 days thereafter to file a Reply Brief in support of their motion for summary judgment or judgment on the pleadings. 4. The parties are granted leave to file briefs not to exceed 30 pages in length. Roszkowski, J./ Notices mailed 7/10/80
7/12/78	Filed plaintiff's Motion for leave to file Memorandum.
7/12/78	Filed Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion for Judgment on the Pleadings.
7/13/78	Enter order dated JULY 12, 1978: Plaintiff's motion to file instanter their memorandum in support of plaintiffs' motion for summary judgment and in opposition to defendant's motion for judgment on the pleadings totaling 36 pages is granted. Roszkowski, J. Notices mailed 7/13/78
8/17/78	Enter order dated August 16, 1978: By agreement of the parties, the time within which the defendant may file its reply brief

	is extended to and including August 21, 1978. Plaintiff may file their reply brief by September 18, 1978. Roszkowski, J. Notices mailed 8/17/78
8/18/78	Filed defendant's opposition to plaintiffs' motion for summary judgment and reply to planitiffs' opposition to defendant's motion for judgment on the pleadings.
9/18/78	Filed Plaintiff's Reply Brief.
2/26/79	Filed 2/23/79 Plaintiff's Citation of Supplemental Authorities.
3/21/79	Enter order dated 3/20/79: It is hereby ordered that this action and both counts thereof may properly be maintained as a class action pursuant to Rule 23(b)(2) of FRCP (DRAFT). Roszkowski, J. Notices mailed 3/21/79
8/30/79	Enter order dated 8/29/79: Plaintiffs motion for summary judgment is granted. (DRAFT) ROSZKOWSKI, J Mailed notices 8/30/79 *JS-6*
9/24/79	Enter Judgment on Decision by the Court dated 9/24/79.
9/26/79	Filed 9/26/79 Federal defendants' Notice of Appeal to the Supreme Court of the U. S.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 420

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE B. HARRIS, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT

Plaintiffs, by their counsel, complain on their own behalf and on behalf of all persons similarly situated, asserting the following as their claim against the United States:

COUNT I

JURISDICTION

1. This action arises under Article III of the Constitution of the United States. Plaintiffs invoke the jurisdiction of this Court under Title 28, United States Code, Section 1346(a)(2). The individual claim of plaintiffs and that of each member of the class they seek to represent does not exceed Ten Thousand Dollars ($10,000.00).

PARTIES

2. (a) Plaintiff JOHN R. BARTELS is a United States District Judge and a member of the United States District Court for the Eastern District of New York.

(b) Plaintiff HENRY BRAMWELL is a United States District Judge and a member of the United States District Court for the Eastern District of New York.

(c) Plaintiff LLOYD H. BURKE is a United States District Judge and a member of the United States District Court for the Northern District of California.

(d) Plaintiff WILLIAM J. CAMPBELL is a Senior United States District Judge and a member of the United States District Court for the Northern District of Illinois.

(e) Plaintiff FRED J. CASSIBRY is a United States District Judge and a member of the United States District Court for the Eastern District of Louisiana.

(f) Plaintiff MARK A. COSTANTINO is a United States District Judge and a member of the United States District Court for the Eastern District of New York.

(g) Plaintiff JACK M. GORDON is a United States District Judge and a member of the United States District Court for the Eastern District of Louisiana.

(h) Plaintiff GEORGE B. HARRIS is a Senior United States District Judge and a member of the United States District Court for the Northern District of California.

(i) Plaintiff EDWARD R. NEAHER is a United States District Judge and a member of the United States District Court for the Eastern District of New York

(j) Plaintiff THOMAS COLLIER PLATT, JR., is a United States District Judge and a member of the United States District Court for the Eastern District of New York.

(k) Plaintiff GEORGE C. PRATT is a United States District Judge and a member of the United States District Court for the Eastern District of New York.

(l) Plaintiff HUBERT L. WILL is a United States District Judge and a member of the United States District Court for the Northern District of Illinois.

(m) Plaintiff SPENCER WILLIAMS is a United States District Judge and a member of the United States District Court for the Northern District of California.

3. Plaintiffs were appointed to their present offices

within the United States Judiciary by the President of the United States with the advice and consent of the United States Senate pursuant to Article III, Section 2 of the Constitution of the United States and have served as Federal Judges pursuant to Article III of the Constitution of the United States during the period commencing October 1, 1976 through and including the filing of this action.

4. The defendant is the United States of America.

CLASS ACTION ALLEGATIONS

5. Count I of this action is brought by plaintiffs on their own behalf and as a class action on behalf of all persons who are serving or who have served as Judges of the United States pursuant to Article III of the Constitution of the United States during part or all of the period commencing October 1, 1976 and continuing to March 1, 1977.

6. The Class which consists of approximately 600 persons is so numerous that joinder of all its members before this Court is impracticable.

7. The claims of plaintiffs are typical of the claims of the Class.

8. The common questions of law and fact raised by this Complaint affect all members of the Class and such common questions predominate over any questions affecting only individual members of the Class. Common relief is sought herein on behalf of all members of the Class, and this class action is superior to other available methods for the fair and efficient adjudication of the controversy which forms the subject matter of this Complaint.

9. The named plaintiffs, with their counsel, will fairly and adequately protect and represent the interests of the Class.

10. The management of the proposed class action will not be difficult, since the defendant has knowledge of the names, addresses and identities of all the members of the Class. Moreover, the factual and legal issues raised by this Complaint will not require extended contact with any member of the Class, since the Complaint concerns a

course of conduct by defendant which is applicable to the whole class and which has been imposed in an identical manner upon plaintiffs and each member of the Class.

CLAIM

11. Article III, Section 1 of the Constitution of the United States, provides in pertinent part that Judges of the United States Courts "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office".

12. Under the Executive Salary Cost-of-Living Act (P.L. 94–82), 5 USC § 5318 and 28 USC § 461 enacted August 9, 1975, the annual rate of pay for positions at each level of the Executive Schedule, (which schedule includes all Federal Judges appointed and serving pursuant to Article III § 1 of the United States Constitution) is required to be adjusted by a percentage equal to the average annual percentage increase in the General Schedule, granted pursuant to the Federal Pay Comparability Act of 1970 5 USC § 5305 et seq., which provides the mechanism for annually adjusting the rates of pay of most federal employees.

13. On or about October 1, 1976 in accordance with the applicable provisions of the Federal Pay Comparability Act of 1970, 5 USC § 5305 et seq., the annual rates of pay for General Schedule employees were increased by an average of 4.8 per cent.

14. Accordingly and pursuant to the applicable provisions of the Executive Salary Cost-of-Living Act and 5 USC § 5301 et seq., the President on October 1, 1976 issued Executive Order 11941, adjusting all Executive Schedule salaries, including the salaries of all Federal Judges by approximately 4.8%. The annual salary of Circuit Judges, Judges of the Court of Customs and Patent Appeals and Judges of the United States Court of Claims were thus established at $46,800 and the annual salary of District Judges and Judges of the United States Customs Court were established at $44,000.

15. On October 1, 1976, the Legislative Branch Appropriations Act, 1977, P.L. 944-440, was passed by Congress, which Act, *inter alia* prohibited payment of the full salary to which Federal Judges were then entitled by law, and specifically limited the appropriation for judicial salaries to a lesser amount, i.e., $44,600 for Circuit Judges, Judges of the Court of Customs and Patent Appeals and Judges of the United States Court of Claims and $42,000 for District Judges and Judges of the United States Customs Court, said amount being the salary levels in effect prior to those established as referred to in paragraph 14 above.

16. As reflected in Bulletin No. 492 issued by the Director of the Administrative Office of the United States Courts (the first page of which is attached hereto as Complaint Exhibit A) and as further reflected in a letter issued by the Acting Comptroller General of the United States on September 21, 1976 to Congressman David N. Henderson (reprinted in the Congressional Record of September 22, 1976 and attached hereto as Complaint Exhibit B), the actions of Congress in adopting P.L. 94-440 and in refusing to appropriate funds to pay the full salary of Federal Judges did not suspend or postpone the operation of the Executive Salary Cost-of-Living Act and did not serve to limit the rates of pay established thereunder. Thus the legal rate of pay for Federal Judges was that set by the President in Executive Order 11941, i.e., $46,800 and $44,000.

17. Notwithstanding the salary levels established under 5 USC § 5318, 28 USC § 461 and the President's Executive Order 11941, the United States has failed and refused to pay the full salary provided by law and payable thereunder to the plaintiffs and each member of the plaintiffs' class.

18. By enactment of the aforesaid provision of P.L. 94-440, and by its continued refusal and failure to pay to plaintiffs and plaintiffs' class the full statutory compensation to which they were entitled during the period October 1, 1976 through March 1, 1977 under 5 USC § 5305, 5 USC

§ 5318, 28 USC § 461 and Executive Order 11941, defendant has violated and continues to violate that provision of Article III § 1 which proscribes the diminution of the compensation of a Federal Judge during his continuance in office.

19. That P.L. 94-440 is unconstitutional is clear, for in failing and refusing to pay the full salary of Judges of the United States appointed pursuant to Article III § 1, as established under Executive Order 11941, Congress has reduced and diminished their compensation as established by law, in clear violation of Article III, § 1 of the Constitution of the United States.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. That this Court find that this action is a proper class action, and that the named parties adequately represent the Class.

B. That upon said findings, this Court order that the action may properly be maintained as a class action as the Class is defined by plaintiffs in this Complaint.

C. That this Court declare that the actions of the defendant as set forth in Count I of this Complaint violate the provisions of Article III, Section 1 which proscribes the diminution of judicial compensation.

D. That this Court order defendant, United States of America, to pay to plaintiffs individually and to each member of their Class all compensation due for the period October 1, 1976 through March 1, 1977.

E. That plaintiffs and each member of their Class recover whatever interest would have been earned on any compensation wrongfully withheld.

F. That plaintiffs recover the costs of this action and be granted such further relief as this Court deems just and appropriate.

COUNT II

1-4. Plaintiffs reallege, as paragraphs 1 through 4 of Count II, paragraphs 1 through 4 of Count I.

CLASS ACTION ALLEGATIONS

5. Count II of this action is brought by plaintiffs on their own behalf and as a class action on behalf of all persons who were appointed and served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to July 11, 1977 and who continued to hold said office subsequent to commencement of the first pay period following October 1, 1977.

6-10. Plaintiffs reallege, as paragraphs 6 through 10 of Count II, paragraphs 6 through 10 of Count I.

CLAIM

11. Article III, Section 1 of the Constitution of the United States, provides in pertinent part that Judges of the United States Courts "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office".

12. Under the Executive Salary Cost-of-Living Act (P.L. 94-82), 5 USC § 5318 and 28 USC § 461 enacted August 9, 1975, the annual rate of pay for positions at each level of the Executive Schedule, (which schedule includes all Federal Judges appointed and serving pursuant to Article III, § 1 of the United States Constitution) is required to be adjusted by a percentage equal to the average annual percentage increase in the General Schedule, granted pursuant to the Federal Pay Comparability Act of 1970, 5 USC § 5305 et seq., which provides the mechanism for annually adjusting the rates of pay of most federal employees.

13. Pursuant to the herein described statutory scheme, the compensation of plaintiffs and each member of their class consists of a stated salary augmented annually by a

cost-of-living adjustment which takes effect the first pay period following October 1 of each year, including 1977. Only the actual amount of said cost-of-living adjustment remains undetermined until on or about October 1 of the applicable year, that to be ascertained on the basis of the average adjustment granted to General Schedule employees under the applicable provisions of the Federal Pay Comparability Act of 1970.

14. Prior to October 1, 1977 Congress passed P.L. 95-66 (a copy of which is attached hereto as Complaint Exhibit C) providing in pertinent part that any adjustment in judicial salaries (and the salaries of other Executive level federal employees) which would ordinarily go into effect on October 1, 1977, "shall not take effect."

15. On September 28, 1977, the President of the United States issued Executive Order No. 12010, increasing by an average of 7.2%, the rates of pay of General Schedule employees pursuant to the applicable provisions of the Federal Pay Comparability Act of 1970. Because of the prohibition set forth in P.L. 95-66, however, a similar adjustment was not ordered in the rates of pay applicable to Federal Judges, notwithstanding those provisions of the Executive Salary Cost-of-Living Act of 1975 which require that the rates of pay of Judges be adjusted by a percentage equal to the average percentage increase in the General Schedule.

16. This purported temporary suspension or single year repealer of the applicable provisions and terms of the Executive Salary Cost-of-Living Act, as that Act pertains to Federal Judges, has the same effect in law as the prior arbitrary refusal to appropriate recited in Count I above.

17. Since the compensation of plaintiffs and each member of their class prior to July 11, 1977, consisted of a stated salary plus an annual cost-of-living adjustment, P.L. 95-66 and actions taken pursuant thereto have diminished the compensation of plaintiffs and their class, in violation of Article III, Section 1 of the Constitution of the United States and said actions, as applied to plaintiffs and their class, are therefore unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. That this Court find that this action is a proper class action, and that the named parties adequately represent the Class.

B. That upon said findings, this Court order that the action may properly be maintained as a class action as the Class is defined by plaintiffs in this Complaint.

C. That this Court declare that the actions of the defendant as set forth in Count II of this Complaint violate the provisions of Article III, Section 1 which proscribes the diminution of judicial compensation.

D. That P.L. 95-66, as applied to plaintiffs and their class, be declared unconstitutional.

E. That this Court order defendant, United States of America, to pay to plaintiffs individually and to each member of their Class all compensation due for the period October 1, 1977 to the date of judgment, by virtue of the diminution of their compensation in violation of Article III, Section 1 of the Constitution of the United States.

F. That plaintiffs and each member of their class recover whatever interest would have been earned on any compensation wrongfully withheld.

G. That plaintiffs recover the costs of this action and be granted such further relief as this Court deems just and appropriate.

One of the Attorneys for Plaintiffs

KEVIN M. FORDE, LTD.
111 West Washington Street
Chicago, IL 60602
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726-5015

COMPLAINT EXHIBIT A

BULLETIN NO. 492
Supplement No. 24
Federal Pay Comparability

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

OCTOBER 11, 1976

TO ALL JUDGES AND OTHER OFFICERS AND EMPLOYEES OF THE UNITED STATES COURTS

SUBJECT: FEDERAL PAY COMPARABILITY

Pursuant to the provisions of the Executive Salary Cost of Living Adjustment Act (PL 94–82, 89 Stat. 419) and 5 USC 5301, et. seq., the President on October 1, 1976, issued Executive Order 11941 adjusting judicial salaries and the rates of basic pay and salaries of employees subject to the General Schedule effective on the first day of the first pay period beginning on or after October 1, 1976.

The Judicial salaries are as follows:

Circuit Judges	$46,800*
District Judges	$44,000**
Judges of the Courts of Claims	$46,800*
Judges of the Court of Customs and Patent Appeals	$46,800*
Judges of the Customs Court	$44,000**
Commissioners of the Court of Claims	$39,600***
Referees in Bankruptcy (full-time)	$39,600***

Pursuant to the Legislative Branch Appropriation Act, 1977, funds are not available to pay a salary or a rate which exceeds the rate in effect on September 30, 1976, as follows:

*$44,600 **$42,000 ***$37,800

The statute permits comparability adjustments in the rates of basic pay of certain officers and employees in or under the Judicial Branch of the Government by amounts

not in excess of the amounts of the respective adjustments made by the President in his Executive Order for employees subject to the General Schedule. These increases average 4.83% but vary by grade from a low of 4.24% for grade GS-5 to a high of 11.83% for grade GS-18. The increases for the Judicial Branch, unless otherwise provided for, are effective October 11, 1976.

The salary increases resulting from these upward adjustments in the rates of basic compensation apply generally to the supporting personnel of the Courts of Appeals and District Courts of the United States, the Temporary Emergency Court of Appeals, the U.S. District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court.

COMPLAINT EXHIBIT B

CONGRESSIONAL RECORD—SENATE

is reenacted every year. As the Attorney General said, in 1909:

The repetition and reenactment of the proviso in each of seven successive years were strange and superfluous. Further, in consequence of the repeated previous treatment of the proviso by Congress as depending upon annual repetition and reenactment for its continued operation, the elimination of the proviso when the appropriation for Farmers' Bulletins was first made in 1907 in the sundry civil appropriation act seems to show that it was then the intention of the Congress to have the rule of the proviso no longer operative.

While general and permanent enactments now not infrequently appear in appropriation acts, the presumption concerning a provision in such an act is rather against permanence.

Finally, Mr. President, I have a copy of a letter dated September 21, 1976, from the General Accounting Office

to the chairman of the Post Office and Civil Service Committee of the House of Representatives. This letter indicates that the Comptroller General would not view this proviso as being permanent legislation. I ask unanimous consent that the letter be printed in the RECORD at this point.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, D.C., September 21, 1976,

Hon. ERNEST F. HOLLINGS,
Chairman, Subcommittee on Legislative Committee on Appropriations, U.S. Senate.

DEAR MR. CHAIRMAN: I am enclosing for your information a copy of our letter of today to the Chairman of the House Committee on Post Office and Civil Service concerning the provision adopted by the conferees in the Legislative Appropriation Act of 1977 placing a limitation on the use of appropriations for the payment of compensation.

You will note that, in our opinion, pay increases to General Schedule employees and those linked to a particular rate of the Executive Schedule would not be affected by the appropriation restriction agreed to by the conferees.

I thought it important to bring this to your attention before the conference report is taken up by the Senate and the House of Representatives.

Sincerely yours,

ROBERT F. KELLER
Acting Comptroller of the United States.

Enclosure.

COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, D.C., September 21, 1976.

HON. DAVID N. HENDERSON,
Chairman, Committee on Post Office and Civil Service, House of Representatives

DEAR MR. CHAIRMAN: This refers to your letter of September 17, 1976, asking 2 questions on the provision in the legislative Branch Appropriation Act 1977 (H.R. 14238) placing a limitation on the use of appropriations for the payment of compensation.

The language in question reads as follows:

"Provided, that none of the funds contained in this Act shall be used to increase salaries of Members of the House of Representatives pursuant to section 204a of Public Law 94–82 in excess of the salary rate in effect on September 30, 1976, for such position or officer. No part of the funds appropriated in this Act or any other Act shall be used to pay the salary of an individual in a position or office referred to in section 225(f) of the Federal Salary Act of 1967, as amended (2 U.S.C. 356), including a delegate to the House of Representatives, at a rate which exceeds the salary rate in effect on September 30, 1976, for such position or office except increases submitted by the President pursuant to section 225 of the Federal Salary Act of 1967."

The first question is whether the language "No part of the funds appropriated in this Act or any other Act" has the effect of extending the prohibition on the use of funds to any increase that would occur after the end of fiscal year 1977. You refer in particular to any increase in salaries that could occur under section 204a of Public Law 94–82, on October 1, 1977, or any date subsequent to the end of fiscal year 1977.

Our view is that a provision in an annual appropriation act may not be construed to be permanent legislation unless the language used or the nature of the provision renders it clear that such was the intention of the Congress. When the word "hereafter" or other words indicating futurity are used, or when the provision is of a general

nature bearing no relation to the object of the appropriation, the provision may be construed to be permanent legislation. We find no wording in the appropriation provision here in question which shows a clear intent to enact a permanent restriction. The term "funds appropriated in this Act" clearly relates only to the funds authorized in 1977 fiscal legislative appropriation act for 1977 fiscal year. The term "or any other Act" covers the same subject matter, that is, pay increases for officers and employees. Those words standing alone are not to be considered as words of futurity. We interpret them as a prohibition on the use of funds in the various other appropriation acts for fiscal year 1977 which otherwise would be used for pay increases of officers and employees whose salaries are not paid from funds authorized by the legislative appropriation act. There are other appropriations act provisions that use the words similar to those under consideration here. They are repeated year after year in the appropriation acts, which is indicative that such provisions were not considered by the Congress to be permanent legislation. Therefore, the first question is answered in the negative.

The second question is what effect the prohibition against the use of funds contained in the quoted provision may have on the salary ceiling for positions under the General Schedule or on positions the rate of pay for which is linked to a particular level of the Executive Schedule. You point out that you have no question as to the application of the limitation to positions under the Executive Schedule. You refer however, to those positions the compensation for which is fixed by law "at an annual rate which is equal to the rate for positions" at a particular level of the Executive Schedule.

Also you refer to 5 U.S.C. 5308 which provides that pay may not be paid to employees under the General Schedule, and several other groups subject to the section, "at a rate in excess of the rate of basic pay for level V of the Executive Schedule."

You state that the intention of Mr. Udall was that the freeze would apply to rates of compensation of the Execu-

tive Schedule and the rates of all positions linked to the Executive Scheule by specific levels or ceilings. There were, we note, references in the debates in the Senate and House to the freeze affecting supergrades (GS-16 through GS-18). Nevertheless, the question you raise is whether the language of the provision actually does this, or whether the provision can be interpreted as not freezing the rates for an employee whose position is not under the Executive Schedule but who is entitled to a rate comparable to the rate of a particular level of the Executive Schedule or who is subject to the rate for Level V under 5 U.S.C. 5308.

The language does not suspend or postpone the operation of Public Law 94-82 and it is not therefore a limitation on the rates of pay established thereunder. The language sets a limitation on the use of funds. By its terms it restricts the use of funds otherwise available "to pay the salary of an individual in a position or office referred to in section 225(f) of the Federal Salary Act of 1967, as amended (2 U.S.C. 356)." It freezes the salary payments of those individuals at the "salary rate in effect on September 30, 1976, for such position or office."

The provisions of section 225(f) are specific as to the positions covered. There is no language in that section which refers to General Schedule employees or to employees linked to the Executive Schedule except as concerns the appropriate pay relationships between the offices and positions under 225 (f) and the offices and positions in the General Schedule. (To construe mention of General Schedule employees in this context as a "reference" within the meaning of the appropriation limitation in question would be to deny an increase in pay to all General Schedule employees, a result clearly not intended. And it follows that if General Schedule employees are not referred to in section 225(f), the appropriation limitation by its terms does not serve to limit their pay.) Thus, a Presidential pay schedule under 5 U.S.C. 5305 authorizing a pay raise for General Schedule and Executive Schedule employees would entitle the General Schedule employee to a raise not

to exceed the rate specified by the President for level V of the Executive Schedule. Likewise, the pay increase would be due employees authorized to receive "a rate equal to a rate for a particular level of the Executive Schedule." The reason for this, as indicated above, is that the pay limitation in the legislative appropriation act does not affect the legal rate that may be set by the President for Executive Schedule positions under other pay fixing procedures. The restriction is solely on the use of funds to pay salary increases to individuals in the positions or offices specified in section 225(f), Since Executive Schedule positions are specified in section 225(f), individuals in those positions could not receive the pay increase. But the legal rates for Executive Schedule offices and positions would still be the rate set by the President and the use of these rates is not prohibited for other pay purposes. The ceiling in 5 U.S.C. 5308 would, however, restrict payment of increases of General Schedule, and other positions subject to section 5308, to the rate set by the President for level V.

Therefore, the answer to question 2 is that pay increases to General Schedule employees and those linked to a particular rate of the Executive Schedule would not be affected by the appropriation restriction here in question.

I note that the restriction on funds for certain pay raises specifically is made inapplicable to increases that may be submitted by the President under section 225 of the Federal Salary Act of 1967.

Sincerely yours,

R. F. KELLER,
Acting Comptroller General of the United States.

ELIMINATION OF THE 1-PERCENT KICKER

Mr. HOLLINGS. I am pleased to report that the House has receded and concurred in the amendment of the Senate eliminating the so-called 1-percent kicker for cost-of-living adjustments in the annuities of Federal and military retirees. The conferees also agreed to a new method of computing such adjustments semiannually on the basis of the actual cost of living, with the computation to be made each

January and July. Adjustments will be made effective as of March and September with payments to be made in the checks made to the annuitants in April and October. The GAO has shown that the 1-percent kicker has led to annuity increases to Federal retirees of 71 percent while the cost of living has risen by only 56 percent. By substituting this new procedure for the current system, we will assure our Federal annuitants full protection to any increases in the cost of living, be it ½ percent, 2 percent, or 3 percent or more; but at the same time saving the Treasury some $3 billion over the next 5 years according to both the Congressional Budget Office and the Office of Management and Budget.

Mr. President, a distinguished former Member of Congress, the Honorable Hastings Keith, has been in the forefront of the battle to repeal the kicker. I was happy to learn that Mr. Keith is making a splendid recovery from his recent open heart surgery. On August 25, 1976, Mr. Keith sent a letter to the Wall Street Journal that completely analyzes this issue. Mr. Keith indicates that for the existing 2.3 million employees and their surviving spouses, the total future cost of the 1-percent kicker alone—above the cost of living—would be about $150 billion, assuming an annual inflation rate of only 6 percent. I ask unanimous consent to have Mr. Keith's article printed in the RECORD at this point.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

LETTER FROM A PENSIONER

(By Hastings Keith)

Your editorial of August 10, "Washington's Generous Pensions" was on target—but you are shooting at a fast-moving gravy train that may already be out of range.

I should, as one of those federal pensioners (civil service, military, congressional) be enjoying the ride, but instead I am sickened by the skyrocketing nature of the benefits and costs—benefits and costs which in the long run are probably more generous and will take propor-

tionately more of the taxpayers' dollars than do the much critized pension plans of New York City and my home state of Massachusetts.

Your editorial was correct in stating that the "kicker" that boosts federal pensions even faster than increases in the costs of living is only a "tiny part" of the total pension problem. But perhaps a little further examination as to how big the "tiny part" is would encourage your readers nationwide to do something about it—like calling their Congressman.

To give you a first-hand view of how the kicker works, consider my pension, which on retirement after 14 years in the Congress, five years and ten months in the military and about three months of Civil Service was, at age 57, $1,560 a month. Thirty-five months later it reached a $2,206 per month, an increase of 41.5% in less than three years time. Stated another way, the increase was almost 50% more than the cost of living, which had gone up 28% during that same 35-month period.

(The 1% add-on or "kicker" as it is sometimes called, was intended to compensate for the time lag that occurs between the actual cost-of-living increase and the effective date of the adjustment. So 1% is added to the cost-of-living formula each time an increase takes place. The problem arises—and overcompensation occurs—because Congress apparently did not realize that the 1% becomes a permanent part of the pension compounding the benefits.)

ALBERT EINSTEIN'S 'DISCOVERY'

Even the relatively sophisticated readers of the Journal will have a difficult time (as do the members of Congress) comprehending how any pension could have compounded so fast. All I can do is remind them of the truth of Albert Einstein's alleged response when he was asked, "What do you, Mr. Einstein, consider to be man's greatest invention?" He didn't reply the wheel or the lever. He is reported to have said, "Compound interest."

Most of us think of interest as compounding annually, but in the case of the federal pension, under its formula, it

compounds—depending on the rate of inflation—as often as twice a year. Hence, over the lifetime of the government's existing 2.3 million employees and their surviving spouses (who will receive 55% of a deceased annuitant's pension) the total future costs of the 1% kicker alone—above the cost of living and all paid for from general revenues—would be about $150 billion, assuming an annual inflation rate of only 6%.

It is significant that these long-range estimates of future costs were not found in the debate—either at the time the 1% add-on to the pension formula was enacted in 1969 or during the debate on August 2 this year when the add-on's elimination was being considered. In 1969 the debate dealt in terms of millions and in a time frame of a year or two. The projected costs in the debate earlier this month were in terms of $2 billion or $3 billion over a 5-year period.

The fact is that if the 1% kicker is only prospectively removed—as called for in the Henderson bill (HR-350)—there will still be a further $40 billion in benefits added to the pensions of federal pensioners and their surviving spouses. All of this additional add-on will not only be above the cost of living, but it will all be paid from general revenues—all done with borrowed money—and all on top of the most generous pension plan in existence.

Rep. Paul Findley (R., Ill.) has proposed an amendment to the Henderson bill which would, in effect, freeze the present annuities of the existing pensioners. His amendment would allow them to keep the more than $1 billion above the cost of living that has already been paid to them; furthermore, it would allow them to continue to draw their pensions at the current rate and, depending upon the future rate of inflation, they could get another $2 billion during the catch-up period. From then on, federal pensions would stay abreast of the cost of living. Over the next 20 to 35 years. Findley's amendment would save—in addition to the savings in the Henderson bill—some $38 billion. (This figure is based on statistics furnished me by the former chief actuary of the Social Security Adminstration, Robert Myers. His computations were confirmed by specialists in the Library of Congress.)

It must be noted that without the acceptance of the Findley amendment, the $38 billion that would be added to existing pensions will be entirely financed from general revenues; none of it will come from employe contributions. Most importantly, it stands in sharp contrast to the fate of the rest of the American workforce which does not benefit from such a program. Few workers enjoy a cost-of-living formula in their pensions; none of them make a "profit" on inflation as do those who have the 1% add-on.

Although the proposed reforms were defeated on August 2, the situation is expected to get a fresh airing, possibly today, when the House is scheduled to take up a bill on pensions for federal judges. The restriction on pension add-ons is expected to be introduced under an open rule permiting amendments.

It would be impossible for Congress to tackle all the points made in your editorial. The current climate in Congress does not encourage any broad-range attack on such matters as early retirement, dual compensation (double-dipping), "outrageous" disability provisions, methods of funding and the matter of integration of federal pensions with Social Security.

The most expensive pension plan is that of the military—it is also the most worthy of reform. It does not recognize that the roles of vast numbers of the military are only remotely related to combat. Only in a very small sector of the vast defense establishment (namely, combat elements of combat command) can the case be made for the lush benefits that now return retirees to the private sector at about age 42 with pensions averaging more than $700 a month. Their pensions increase under the same

COMPLAINT EXHIBIT C

Public Law 95-66
95th Congress

An Act

July 11, 1977
[S. 964]

To provide that the salaries of certain positions and individuals which were increased as a result of the operation of the Federal Salary Act of 1967 shall not be increased by the first comparability pay adjustment occurring after the date of the enactment of this Act.

Federal comparability pay adjustments
Temporary prohibition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That, the first adjustment which, but for this Act, would be made after the date of enactment of this Act under the following provisions of law in the salary or rate of pay positions or individuals to which such provisions apply, shall not take effect:

3 USC 104 note.

(1) the second sentence of section 104 of title 3, United States Code, relating to comparability adjustments in the salary of the Vice President of the United States;

2 USC 31 note.

(2) paragraph (2) of section 601(a) of the Legislative Reorganization Act of 1946 (2 U.S.C 31), relating to comparability adjustments in the annual rate of pay of Members of Congress;

28 USC 461 note.

(3) section 461 of title 28, United States Code, relating to comparability adjustments in the salary and rate of pay of justices, judges, commissioners, and referees; and

5 USC 5318 note.

(4) section 5318 of title 5, United States Code, relating to comparability adjustments in the annual rate of pay for positions in the Executive Schedule.

Approved July 11, 1977.

[CAPTION OMITTED]

ANSWER

The United States of America, by its undersigned attorneys, hereby answers the allegations of plaintiffs' complaint as follows:

FIRST DEFENSE

The Court is without jurisdiction over the subject matter of this complaint.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

Responding specifically to the numbered paragraphs of the complaint, defendant admits, denies, and alleges as follows:

Count I

1. Denies the first and second sentence. Admits the third sentence.

2–4. Admits.

5–10. These paragraphs contain conclusions of law to which no response is required, though to the extent a response may be deemed required, denies.

11. Admits.

12. This paragraph contains conclusions of law to which no response is required, though to the extent that a response may be deemed required, denies and refers the Court to 5 U.S.C. § 5318, 28 U.S.C. § 461 and 5 U.S.C. § 5305 for a complete statement of their contents.

13. Admits.

14–19. These paragraphs contain conclusions of law to which no response is required, though to the extent that a response may be deemed required, denies.

Count II

1–10. Defendant incorporates by reference his answers to paragraphs 1–10 of Count I as answers to the allegations in these paragraphs.

11. Admits.

12. These paragraphs contain conclusions of law to which no response is required, though to the extent that a response may be deemed required, denies and refers the Court to 5 U.S.C. § 5318, 28 U.S.C. § 461 and 5 U.S.C. § 5305 for a complete statement of their contents.

13. Denies.

14. Denies and refers the Court to Pub. L. 95–66 for a complete statement of its contents.

15. Admits the first sentence. The second sentence contains conclusions of law to which no response is required,

though to the extent that a response may be deemed required, denies.

16–17. These paragraphs contain conclusions of law to which no response is required, though to the extent a response may be deemed required, denies.

Defendant denies all allegations not specifically responded to above.

WHEREFORE, defendant prays that plaintiffs' complaint be dismissed and that defendant have its costs.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General

ANTHONY J. STEINMEYER

LAWRENCE J. JENSEN
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Washington, D.C. 20530
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[CAPTION OMITTED]

PLAINTIFFS' MOTION FOR CLASS DETERMINATION

Now come Plaintiffs by their counsel and, pursuant to Rule 23, F.R.Civ.P., respectfully move this Honorable Court to enter an order determining that this action and both Counts thereof may properly be maintained as a class action pursuant to Rule 23, F.R.Civ.P.

CLASS DEFINED

In support to this Motion Plaintiffs state that the classes on behalf of which this action is sought to be maintained may be described as follows.

Count I

The class in Count I consists of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States during part or all of the period commencing October 1, 1976 and continuing to March 1, 1977.

Count II

The class in Count II consists of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to July 11, 1977 and who continued to hold said office subsequent to commencement of the first pay period following October 1, 1977.

No judge appointed after July 11, 1977, is a member of either class and no claim is asserted on behalf of any such person. While there is considerable overlap in the two classes, in that members of the class in Count I are also members of the class in Count II, the classes are distant with distinct claims.

THE BASIC PREREQUISITES

In further support of this Motion, Plaintiffs allege with respect to the class defined in each count of the Complaint:

1. The class which Plaintiffs seek to represent is so numerous that joinder of all members is impracticable. In each Count the proposed class consists of approximately 600 persons serving in United States Courts throughout the United States.

2. There are questions of law and fact common to the class. Indeed, every issue of each Count is common and identical as to each and every class member. All issues presented concern the legal effects of certain actions by the Congress of the United States and the question of whether such actions violated Article III Section 1 of the Constitution, which provides that Judges of the United States shall receive a compensation, "which shall not be diminished during their Continuance in Office."

There are no individual issues in the case.

3. The claims of the representative parties are typical of the claims of the members of the class. As noted above (in paragraph 2), the claims of Plaintiffs are not only typical but identical to the claims of each and every member of the class. Every named representative party is a member of the class in each Count and each asserts the same claim as all other class members.

4. The representative parties will fairly and adequately represent the class. The named plaintiffs are 13 distinguished members of the United States Courts; they assert the same claims on their own behalf as those asserted on behalf of the class. Their counsel are experienced in the litigation of cases of this nature.

Plaintiffs further state, pursuant to subparagraph (b) (2) of Rule 23, that the party opposing the class in each Court [the United States] has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Plaintiffs respectfully submit with respect to this prerequisite that it is apparent from the Complaint that the party opposing the class in each Count [the United States] has clearly acted on grounds generally applicable to the class. Both Counts contend that the actions of the United States violated the rights of each and every class member provided for under Article III Section 1 of the Constitution, which provides that they, as Judges of the United States, receive "Compensation which shall not be diminished during their Continuance in Office."

With specific reference to the claims asserted on behalf of the class in Count I, the passage of P.L. 94–440 (Count I par. 15) prohibiting payment of the full salary to which Judges were entitled by law, is generally applicable to the class. With reference to the claims asserted in Count II, the United States has acted in a manner generally applicable to the class by the passage of P.L. 95–66, referred to at Count II paragraphs 14–17, providing in pertinent part that any adjustment in judicial salaries which would have

taken effect on July 11, 1977, shall not be paid. In short, the United States has refused to act on grounds generally applicable to each member of each class in its refusal to pay the full salaries of Federal Judges, as alleged in both Counts of the Complaint.

Based on the claims of the class, the most appropriate relief is declaratory relief with respect to each class as a whole. The Prayer of each Count of the Complaint seeks first and foremost a declaration that the actions of the United States alleged therein violate the provisions of Article III, Section 1, which proscribes the diminution of judicial compensation.

WHEREFORE, Plaintiffs respectfully submit that the motion to maintain this action, and both Counts thereof, as a class action pursuant to Rule 23 (b) (2), F.R.Civ.P. should be granted.

Respectfully submitted,

One of the Attorneys for Plaintiffs

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[CAPTION OMITTED]

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR CLASS DETERMINATION

Defendant does not oppose the plaintiffs' Motion for Class Determination. Defendant does, however, urge the Court in the exercise of its discretion under Rule 23(d)(2), Federal Rules of Civil Procedure, to require that notice of this suit be given to the approximately 600 judges in each of the proposed classes that provides them with an oppor-

tunity to request exclusion from either or both of the classes by a specified date.

This suit involves sensitive constitutional questions about the separation of powers as between the Congress and the Judiciary in the matter of judicial salaries. It follows by only a few months another suit brought by some of the same plaintiffs and others involving similar questions on different facts. *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1976), *cert. den.*, 45 U.S.L.W. 3436 (January 10, 1978). In *Atkins*, which was brought in the Court of Claims where no class actions are allowed, most of the federal judges declined to join with the plaintiffs in bringing the suit. Even fewer participated in seeking Supreme Court review. Defendant submits that this is indicative of the fact that many of these federal judges were unsympathetic to the claims being made and did not want to be associated with them. The same may well be true here. Where these constitutional issues are being litigated and where the members of the proposed class are uniquely qualified to judge for themselves the merits of the issues, defendant suggests that it would be appropriate for the Court under Rule 23(d)(2) to require that notice be given to the proposed class members informing them of the suit and of their privilege to request exclusion from the class by a specified date. See *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (2nd Cir. 1968).

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General

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Telephone: (202) 739-3383
Attorneys for Defendant

[CAPTION OMITTED]

MOTION FOR JUDGMENT ON THE PLEADINGS

The United States, by its undersigned attorneys, hereby moves the Court for judgment on the pleadings in its favor pursuant to Rule 12(c), Federal Rules of Civil Procedure.

A statement of points and authorities in support of this motion is attached.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General

ANTHONY J. STEINMEYER

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Telephone: (202) 739-3383
Attorneys for Defendant

[CAPTION OMITTED]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Now Come Plaintiffs by their counsel and, pursuant to Rule 56, F.R.Civ.Proc., respectfully move that this Court enter summary judgment for plaintiffs and against defendant on both Counts of the Complaint.

In support of this Motion plaintiffs state that the pleadings, including the Complaint and the exhibits incorporated therein, the defendant's Answer and the affidavit to be submitted by plaintiffs with their Memorandum of Law, all show that there are no genuine issues of any material facts and plaintiffs, and every member of their class, are entitled to judgment as a matter of law.

In further support of this Motion plaintiffs state that the damages suffered by each plaintiff and each member of the

class is readily ascertainable by a simple mathematical computation and, assuming liability is imposed, there is no dispute as to the amount of or the method of computation of damages.

Respectfully submitted,

_____

One of the Attorneys for Plaintiffs

KEVIN M. FORDE
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726-5015

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726-5015

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
WASHINGTON, D.C. 20544

AFFIDAVIT

I, Joseph A. Leach, Chief of the Payroll Section, Financial Management Division, hereby state that the attached document captioned as Transmittal 18 to Volume III, Guide to Judiciary Policies and Procedures, is a true and accurate statement of the policies relating to payroll and salary procedures as administered by the Administrative Office of the United States Courts as of this time:

I further certify that so much of Title IX of this document as provides:

> "Judges, referees in bankruptcy and United States magistrates are paid by checks dated the first of each month (covering salary for the month just closed)"

is a policy which was also in effect in the period from and before September 1976 to the present.

For judges of the United States courts, the pay period commences on the first day of each month, and the Oc-

tober 1, 1976, adjustment was therefore effective on October 1, 1976.

The statement in Bulletin No. 492, Supplement No. 24, dated October 11, 1976, that "[T]he increases for the judicial branch, unless otherwise provided for, are effective October 11, 1976," did not relate to the pay increases for judges, but rather concerned the pay increases for non-judicial employees of the judicial branch, whose next pay period following October 1, 1976, began October 11, 1976. As respects federal judges, the above quoted provision of the Guide to Judiciary Policies and Procedures provided otherwise in determining the date of commencement of the applicable pay period. Accordingly, the first pay period for judges on or after October 1, 1976, began on October 1, 1976.

I certify under penalty of perjury that the foregoing is true and correct. Executed on July 5, 1978.

JOSEPH A. LEACH

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
WASHINGTON, D.C. 20544

MAY 5, 1978

TRANSMITTAL 18 (Volume III) FOR GUIDE TO JUDICIARY POLICIES AND PROCEDURES

To : Federal Judges
Circuit Executives
Clerks of Court

From : William E. Foley

Subject : Guide to Judiciary Policies and Procedures, Volume III, Judges' Manual

Attached is Title XI, Payroll, Retirement and Other Benefits, to Volume III, Judges' Manual. Revised

Exhibits XIA and XIB were provided as a part of Transmittal 1 (Volume III) dated June 1, 1977. Exhibit XIB has again been revised and is attached. Also attached is an additional Exhibit XIC, List of the Cities with which the Secretary of the Treasury has Entered into an Agreement for Withholding City Income and Employment Taxes.

New material being presented is as follows:

Page XI-3 —City or County Income or Employment Taxes.

Page XI-4 —Table covering retirement benefits for territorial judges.

Page XI-5 —Federal Employees' Group Life Insurance: current amount of coverage for circuit and district judges.

Page XI-6 —Third paragraph: requirement for stipulating a trustee for a revocable life insurance trust on SF-54.

Page XI-8 —Allotments of Pay for Savings Accounts: restriction removed to cover officers outside the continental United States.

Page XI-8 —Statement of Earnings.

The attached material replaces that information previously published in the Guide to the Administrative Organization of the United States Courts. Other titles to the Guide are now in the process of being revised and will follow soon, all to be issued as a part of Volume III, Judges' Manual.

FILING INSTRUCTIONS.

The attached pages should be filed in back of the tab titled Title XI, Payroll, Retirement and Other Benefits. Remove Exhibit XIB dated June 1, 1977.

This transmittal may be discarded after it has been logged and the attached material filed.

Barbara Peyton of the Administrative Services Division (FTS 633-6057) may be consulted for specific questions on the mechanics of the system. We continue to encourage your comment on the material that you are receiving.

Title XI. Payroll, Retirement and Other Benefits

Salary payrolls for the Federal judges and their immediate staffs currently are being prepared by the Administrative Office. The clerk of the district court is the Payroll Certifying Officer for his staff as well as all circuit and district judges and their staffs whose official headquarters are located within his district except that the clerk of the court of appeals is the Payroll Certifying Officer for circuit judges and their staffs stationed in the same city as the circuit clerk's office. Judges, referees in bankruptcy and U.S. magistrates are paid by checks dated the first of each month (covering salary for the month just closed). All other court employees are paid every two weeks but on the Friday following the close of a biweekly pay period. The salary checks are issued by the Treasury Department in Washington, D. C. A judge may have his check delivered to his office, home address or directly to a bank. The checks for a judge's staff will be mailed to the Payroll Certifying Officer if located in the same city, directly to the employee's office address if stationed elsewhere, or to a bank.

Any officer or employee may elect to receive his full net pay on a regular recurring basis in the form of a check drawn in favor of a financial organization of his choice for credit to his account in lieu of a check drawn to his order. The election may be effected by securing SF 1189, Request by Employee for Payment of Salaries or Wages by Credit to Account at a Financial Organization, from the Payroll Certifying Officer for completion by the employee and the financial organization concerned. The original of the form should be returned to the Payroll Certifying Officer and a copy may be retained by the employee and the financial organization. A cancellation specifying the termination date may be accomplished by memorandum to the Payroll Certifying Officer for transmittal to the Administrative Office.

Judge's salaries are computed on the basis of a 30-day month, so that a judge entering on duty during a given month will be paid, for that month, his regular monthly salary less one-thirtieth of that amount for each day of the

month which had elapsed prior to his entry on duty (5 U.S.C. 5505). In accordance with decision of the Comptroller General of the U.S. B–11533 (20 CG 90) the salary of a judge is effective currently with his first affirmative action accepting his commission—normally this is the taking of the oath of office. Compensation will be computed for the full day on which the oath of office is taken unless it is the thirty-first day of the month.

A salary table of judges follows as Exhibit XI-A. A table of the grades and annual salary rates under the Judiciary Salary Plan is included as Exhibit XI–B. The rates, incidentally, are identical to those for the comparable grades under the General Schedule of the Classification Act of 1949, as amended.

Judges should give the clerk of the court advance notice of the date their employees will enter on duty so that the clerk may be prepared to furnish employees with information concerning such matters as life insurance, health benefits, and tax forms.

Federal Taxes. The Payroll Certifying Officer will furnish Form W–4, Employee's Withholding Allowance Certificate. Line 2 of the Federal form may be used to request additional withholding per pay period in multiples of $5.

State Taxes. The Secretary of the Treasury has entered into an agreement with the following states to withhold State taxes from the compensation of Federal employees:

Alabama; Alaska; Arizona; Arkansas; California; Colorado; Delaware; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; New Jersey; New Mexico; New York; North Carolina; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; Utah; Vermont; Virginia; West Virginia; and, Wisconsin.

The Payroll Certifying Officer will furnish any required state tax exemption certificate. Additional state tax withholding may be authorized in multiples of $1 per pay period. Judicial officers and employees in the District of Columbia may authorize District of Columbia or state tax

deductions through payroll withholding by filing a special form available from the clerk of court.

City or County Income or Employment Taxes. Pursuant to the provisions of 5 U.S.C. 5520, withholding for city or county income or employment taxes is required when the Secretary of the Treasury has entered into an agreement with a qualified taxing authority, if the Federal officer or employee is subject to the tax, and his official headquarters is within the political boundaries of the city or county. A list of the participating cities and the type of tax is included as exhibit XIC. The Payroll Certifying Officer will furnish TFS Form 7311, Employee's Withholding Certificate for City Taxes; this form must be completed if city taxes are required to be withheld from salary. At the present time, the only county tax that must be withheld is the Occupational License Tax for Jefferson County, Kentucky; since this tax is the same that is withheld for the City of Louisville, the county tax would only apply if the official headquarters is a city other than Louisville but in Jefferson County.

Retirement Systems.

Federal Judicial Retirement. A judge who is appointed to hold office during good behavior is excluded from coverage under the Civil Service Retirement or Social Security Systems because he is subject to the Federal Judicial Retirement as set forth in 28 U.S.C. 371, 372. It is a noncontributory system and only Federal Judicial service is creditable. The requirements are set forth in the following table:

Type of Retirement	Minimum Age	Minimum Years of Service	Compensation
Sec. 371(a) resignation	70	10	Salary at time of resignation
Sec. 371(b) retirement	70	10	Salary of the office
Sec. 371(b) retirement	65	15	Salary of the office
Sec. 372(a) disability	none	10	Salary of the office
Sec. 372(a) disability	none	less than 10	One-half of the salary of office

No provision for deferred compensation, i.e., both the minimum age and years of service requirements must be met at the time of resignation or retirement.

A territorial judge appointed for a term of years is subject to the provisions of 28 U.S.C. 373. The following table would apply for benefits payable to separated territorial judges:

Type of Retirement	Minimum Age	Minimum Years of Service	Compensation[1]
Resignation	70	10	Salary at time of separation
Resignation	65	15	Salary at time of separation
Removed due to disability, or fails of reappointment	65[2]	16	Salary at time of separation
Removed due to disability or fails of reappointment	65[2]	10	Proportion of salary which years of service bear to 16.

The Internal Revenue Service has ruled that a judge who retires because of disability under 28 U.S.C. 372(a), may take advantage of the sick pay exclusion as provided by 105(d) of the Internal Revenue Code (26 U.S.C. 105 (d). The IRS indicated that the "sick pay" exclusion could be taken in that the retirement was caused by declining health which rendered the judge permanently disabled and that the statute under which he retired (28 U.S.C. 372) is a wage continuation plan within the purview of 105(d). On the basis of information submitted in this case, the IRS concluded that retirement salary was not subject to a total exclusion under 104(a)(1), of the Internal Revenue Code because the judge's retirement "was not due to an occupational injury or illness arising out of and in the course of his work." The IRS left open the question of when "mandatory retirement age" occurs in the case of a federal

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[1] Subject to same cost-of-living adjustment granted under Civil Service Retirement System provided that total amount payable does not exceed 95% of a United States District Judge's salary.

[2] Payable upon relinquishment of office if beyond age 65 or upon attainment of age 65.

judge under 105(d) and the exclusion is no longer available to the taxpayer. Copies of the opinion may be obtained from the Office of the General Counsel, Administrative Office of the U.S. Courts.

Judicial Survivors' Annuities System. A complete description of the Judicial Survivors' Annuities System providing annuities for the spouse and surviving dependent children of a federal judge may be found in Title IX of this volume.

Civil Service Retirement. A judge's personal staff is subject to the Civil Service Retirement Act unless excluded by law or regulation due to the nature of the appointment. A certificate under the Civil Service Retirement System explaining the benefits will be transmitted with the personnel notice covering the appointment. If eligible, coverage is automatic but the deductions are either returned in a lump sum upon separation from Government service or through annuity benefits. An employee who is not subject to another Federal retirement system and is excluded from coverage under the Civil Service Retirement System by the nature of the appointment, would be subject to the Social Security System.

Federal Employees' Group Life Insurance. Each judge and his personal staff are eligible to participate in the Federal Employees' Group Life Insurance Program consisting of regular and optional insurance. Unless the insurance was waived on or after 2/14/68, during prior Federal service, coverage under the regulation insurance is automatic upon entrance on duty. General information about the program is set forth in SF 176A, Federal Employees' Group Life Insurance Program. If a judge is receiving the full statutory salary, the amount of regular insurance is presently $60,000 for a circuit judge and $57,000 for a district judge.

Each officer and employee (unless by the nature of appointment is excluded by law or regulation from participating) will be furnished a SF 176, Election, Declination, or Waiver of Life Insurance Coverage, by the Payroll Certifying Officer to be executed and returned in duplicate

within 31 days after entrance on duty. The form must be executed unless one has been filed during prior Federal employment, which would remain in effect. It should be noted that if the insurance is waived, coverage cannot be obtained until after one year from the date of the waiver, provided the officer or employee is under age 50 at the time application is made to cancel the waiver, and satisfactory evidence of insurability can be met.

Deductions for the regular insurance must be made from the first salary payment unless the SF 176, in which coverage is waived, is received by the Payroll Certifying Officer on or before the last day of the first pay period. The optional insurance is in the amount of $10,000 and coverage would be determined by the date the SF 176 is received by the Payroll Certifying Officer; however, if optional insurance was elected during prior Federal employment, coverage would be effective with entrance on duty.

After the SF 176 is filed with the Payroll Certifying Officer, the insured will receive a certificate for the regular insurance, as well as one for optional insurance, if elected. A SF 54, Designation of Beneficiary, Federal Employees' Group Life Insurance Act (obtained from the Payroll Certifying Officer), should be executed and filed in duplicate with the Administrative Office, only if the order of precedence as stated on page 5 of the SF 176A is unsatisfactory.

A designation of beneficiary under the life insurance program is restricted to the types of examples as shown on the reverse side of Standard Form 54 with one exception. A trustee for a revocable life insurance trust may be designated but the following stipulation must be shown under the designation of beneficiary or on an attachment to the form if there is insufficient room: "The Office of Federal Employees' Group Life Insurance shall not be responsible for application or disposition of such insurance proceeds by said Trustee and the receipt of said Trustee shall be full discharge of the liability of said Office under the Federal Employees' Group Life Insurance Act."

The statements of page 6 of the SF 176A, referring to coverage after retirement from Government Service, DO

NOT APPLY TO A JUDGE unless he resigns but compensation continues under 28 U.S.C. 371(a) or 373. The CSC ruled that the judges who "retire" under the provisions of 28 U.S.C. 371 (b) or 372 are not considered as "retired employees" and remain officers of the U.S. within the meaning of the insurance act. Therefore, there is NO REDUCTION of 2% a month in the amount of regular or optional insurance coverage for a judge because of age or retirement and the premium will continue to be deducted after retirement under 28 U.S.C. 371(b) or 372. Should a judge retire under 28 U.S.C. 372 and receive compensation less than the current statutory salary of the office, the amount of the regular insurance coverage would be based on the lower compensation. A judge also retains the accidental death and dismemberment insurance coverage after retirement under 28 U.S.C. 371(b) or 372.

Federal Employees Health Benefits Program. A judge and his personal staff (unless excluded by law or regulation, based on the nature of appointment) may elect to participate in the Federal Employees Health Benefits Program offering protection against the cost of illness or accident. A SF 2809, Health Benefits Registration Form, either electing coverage or non-enrollment, must be executed and filed with the Payroll Certifying Officer within 31 days from entrance on duty. There are several plans available and brochures describing each plan available in the area, as well as the cost, will be furnished by the Payroll Certifying Officer with the Health Benefits Registration Form. A general description of the program is contained in SF 2809A, The Federal Employees Health Benefits Program. BRI 31-210, Information to Consider in Choosing a Health Plan, may be secured from the Payroll Certifying Officer. The effective date of coverage is stated on page 10 of SF 2809A (see page 11, Continuation of Enrollment, if transferring from other Federal service).

Voluntary Allotments.

Combined Federal Campaign. Payroll withholding may be made for charitable contributions to the Combined

Federal Campaign in those areas where a federal organization has been established. An authorization form may be secured from the Payroll Certifying Officer to be executed and returned to him. Allotters must make a single allotment of an equal amount to be deducted each pay period during the year, with a minimum of $1 monthly or 50¢ biweekly, to commence with the first pay period beginning in January and ending with the last pay period which begins in December. Allotments will be discontinued automatically on expiration of the one-year withholding period or may be revoked by request, in writing, to the Payroll Certifying Officer.

United States Savings Bonds. The Judiciary is participating in the Voluntary Savings Plan for purchase of U.S. Savings Bonds through payroll withholding. The minimum allotment for bond purchases is $6.25 per monthly pay period and $3.75 biweekly pay period. The bond authorization should be in aliquot parts (amounts which divide equally into the whole, i.e., without a remainder) of the total purchase price. SF 1192, U.S. Savings Bond Authorization for Purchase and Request for Change, may be secured from the Payroll Certifying Officer and returned to him after execution. Delivery of the bonds will be by mail.

Allotments of Pay for Savings Accounts. Any officer or employee may authorize an allotment of pay for a savings account provided: (a) the allotment is a fixed amount in whole dollars (no cents) to be deducted in each successive payroll, and (b) not more than two such allotments for any one officer or employee shall be in effect at any time. A savings account is a single or joint account for the purchase of shares (other than shares of stock) or for the deposit of savings in any financial organization, the title of which account includes the name of the authorizing employee. A financial organization means any bank, savings bank, savings and loan association or similar institution, or federal or state chartered credit union, except any foreign financial organization. SF 1198, Request by Employee for Allotment of Pay for Credit to Savings Account with a Fi-

nancial Organization, may be obtained from the Payroll Certifying Officer. The original should be returned to the Payroll Certifying Officer and a copy retained by the employee and the financial organization. The executed SF 1198 serves as the required written authorization and evidence (by endorsement thereon by the financial organization), that the financial organization is willing to act in this respect as agent and to accept at its expense the related service charge. The actual receipt of the savings allotment check by the financial organization may be three or four business days after the payroll pay date. A cancellation, specifying the termination date, may be accomplished by memorandum to the Payroll Certifying Officer.

Statement of Earnings. A Statement of Earnings is issued each pay period setting forth the annual salary rate, ending date of the pay period, tax exemptions being claimed, current deductions and year-to-date totals. The form will be distributed by the Payroll Certifying Officer. It is suggested that each officer and employee review the data on the form to determine that the proper deductions are being made. The Statement should be retained until one is received for the subsequent pay period since any difference in the data shown on the two forms would explain the reason for any change in the next check. The final Statement of Earnings for the year should be retained to determine the total yearly health benefits withholdings if deductions are itemized on the individual tax return.

Other Benefits.

Compensation for Work Injuries. Officers and employees of the Judiciary are also subject to benefits of the Federal employees compensation law (5 U.S.C. 8101) for an injury sustained while in the performance of duty; if the injury is fatal, supervisorship benefits may be payable as well as certain burial expenses. Every occupational injury must be reported to an immediate superior officer without delay; the appropriate claim forms may be obtained from the Personnel Division of the Administrative Office.

Unemployment Compensation. Like other Federal employees, the Judiciary is subject to the benefits of unemployment compensation for Federal employees (5 U.S.C. 8501). The program provides unemployment benefits for civilian Federal employees similar to those provided by state unemployment insurance laws to workers in private industry. SF 8, Notice to Federal Employee about Unemployment Compensation, covering the procedure to be followed in applying for benefits will be furnished by the Payroll Certifying Officer to the officer or employee when separated from the service, or in a non-pay status for seven calendar days or more.

Exhibit XI-B
(Title 28 - Judiciary)

THE JUDICIARY

SCHEDULE OF ANNUAL SALARY RATES FOR EMPLOYEES
SERVING IN FULL-TIME GRADED POSITIONS
(Effective October 10, 1977)

JSP* GRADE	ANNUAL RATES AND STEPS										AMOUNT OF WITHIN-GRADE INCREASE
	1	2	3	4	5	6	7	8	9	10	
1	$ 6,219	$ 6,426	$ 6,633	$ 6,840	$ 7,047	$ 7,254	$ 7,461	$ 7,668	$ 7,875	$ 8,082	$ 207
2	7,035	7,270	7,505	7,740	7,975	8,210	8,445	8,680	8,915	9,150	235
3	7,930	8,194	8,458	8,722	8,986	9,250	9,514	9,778	10,042	10,306	264
4	8,902	9,199	9,496	9,793	10,090	10,387	10,684	10,981	11,278	11,575	297
5	9,959	10,291	10,623	10,955	11,287	11,619	11,951	12,283	12,615	12,947	332
6	11,101	11,471	11,841	12,211	12,581	12,951	13,321	13,691	14,061	14,431	370
7	12,336	12,747	13,158	13,569	13,980	14,391	14,802	15,213	15,624	16,035	411
8	13,662	14,117	14,572	15,027	15,482	15,937	16,392	16,847	17,302	17,757	455
9	15,090	15,593	16,096	16,5	17,102	17,605	18,108	18,611	19,114	19,617	503
10	16,618	17,172	17,726	18,280	18,834	19,388	19,942	20,496	21,050	21,604	554
11	18,258	18,867	19,476	20,085	20,694	21,303	21,912	22,521	23,130	23,739	609
12	21,883	22,612	23,341	24,070	24,799	25,528	26,257	26,986	27,715	28,444	729
13	26,022	26,889	27,756	28,623	29,490	30,357	31,224	32,091	32,958	33,825	867
14	30,750	31,775	32,800	33,825	34,850	35,875	36,900	37,925	38,950	39,975	1,025
15	36,171	37,377	38,583	39,789	40,995	42,201	43,407	44,613	45,819	47,025	1,206

*Judiciary Salary Plan (Equivalent to GS grades)

LIST OF CITIES WITH WHICH THE SECRETARY OF THE TREASURY HAS ENTERED INTO AN AGREEMENT FOR WITHHOLDING CITY INCOME AND EMPLOYMENT TAXES

City	Type of Tax
Akron, Ohio	City Income Tax
Battle Creek, Mich.	City Income Tax
Birmingham, Ala.	Occupational License Tax
Brookeville, Ohio	City Income Tax
Caln Township, Pa.	(Earned Income Tax and (Occupational Privilege Tax
Canton, Ohio	City Income Tax
Cincinnati, Ohio	City Income Tax
Cleveland, Ohio	Municipal Income Tax
Columbus, Ohio	City Income Tax
Covington, Ky	City Earnings Tax
Dayton, Ohio	City Income Tax
Denver, Colo.	Occupational Privilege Tax
Detroit, Mich.	City Income Tax
Erie, Pa.	(City Income Tax and (Occupational Privilege Tax
Fairview Township, Pa.	(Earned Income Tax and (Occupation Privilege Tax
Flint, Mich.	City Income Tax
Grand Rapids, Mich.	City Income Tax
Hampden Township, Pa.	(Earned Income Tax and (Occupational Privilege Tax
Harrisburg, Pa.	(Earned Income Tax and (Occupational Privilege Tax
Heath, Ohio	City Income Tax
Kansas City, Mo.	Earnings and Profits Tax
Kettering, Ohio	City Income Tax
Lancaster, Pa.	(Earned Income Tax and (Occupational Privilege Tax
Lansing, Mich.	City Income Tax
Lexington, Ky.	Occupational License Fee
Louisville, Ky.	Occupational License Tax
Mansfield, Ohio	City Income Tax
New York, N.Y.	Personal Income and Earnings Tax
North Middleton Township, Pa.	Earned Income Tax
Oberlin, Ohio	City Income Tax
Philadelphia, Pa.	City Wage Tax
Pittsburgh, Pa.	(Occupation Tax and (Municipal Tax
Plains Township, Pa.	(Earned Income Tax and (Occupational Privilege Tax
Pontiac, Mich.	City Income Tax
Reading, Pa.	(Earned Income Tax and (Occupation Privilege Tax
Richmond, Ky.	City License Fee
Saginaw, Mich.	City Income Tax
Scranton, Pa.	(Earned Income Tax and (Occupational Privilege Tax
Sharonville, Ohio	City Income Tax
South Lebanon Township, Pa.	Occupational Privilege Tax
Springfield, Ohio	Earned Income Tax
St. Louis, Mo.	City Income Tax
Toledo, Ohio	City Income Tax
Whitehall, Ohio	City Income Tax
Wilkes Barre, Pa.	Earned Income Tax
Wilmington, Del.	Earned Income Tax
Youngstown, Ohio	City Income Tax

ORDER

This cause comes before this Court on plaintiffs' motion for class determination. The amended complaint in this case names 13 Judges of the United States Courts as plaintiffs. They bring the suit on their own behalf and on behalf of all persons similarly situated. In their two-count complaint, plaintiffs seek a declaration that the compensation clause of Article III, Section 1 of the Constitution of the United States was abrogated and violated by the enactment of portions of Title II of the Legislative Branch Appropriation Act of 1977, 90 Stat. 1439, and Public Law 95–66, 91 Stat. 270. It is alleged that both of these laws operated to deny the plaintiffs cost-of-living increases in their salaries which would otherwise have taken place pursuant to the Executive Salary Cost-of-Living Adjustment Act, 28 U.S.C. Section 461.

Rule 23 of the Federal Rules of Civil Procedure contains the essential prerequisites for maintaining a class action. Pursuant to subsection (a) of Rule 23, one or more members of a class may sue or be sued on behalf of the class if:

(1) The class is so numerous that joinder of all members is impracticable;

(2) There are questions of law or fact common to the class;

(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) The representative parties will fairly and adequately protect the interests of the class.

Rule 23(a)(1) is clearly met in that the proposed class consists of more than 600 persons who served as Judges of the United States Courts pursuant to Article III of the Constitution of the United States. Obviously, joinder of all 600 persons would be impracticable.

Rule 23(a)(2) is met in that the facts and legal issues involved here are the same for every member of the class. We agree with plaintiffs when they note that there are no individual issues in the case. The effect of the statutes in question was identical for each class member. This also

more than satisfies the requirement that the representative parties' claims be typical of the claims of the class, as required by Rule 23(a)(3).

Finally, Rule 23(a)(4) is clearly met. The claims of the named plaintiffs are the same as the claims of all the class members. Further, they are represented by experienced counsel.

Once the Rule 23(a) prerequisites are met, Rule 23(b)(2) must also be satisfied:

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Clearly, by enacting the statutes in question, the defendant "has acted . . . on grounds generally applicable to the class. . . ." Rule 23(b)(2) relief seems the most practical to ask for. The protections of individual notice and opting out are not necessary in this case, nor is exclusion available in a (b)(2) action. *Air Line Stewards and Stewardesses Association v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973). Additionally monetary relief in the form of back pay is possible in a (b)(2) action. *See Robinson v. Lorillard Co.*, 444 F.2d 791, 802 (4th Cir. 1971), *app. dis.*, 404 U.S. 1006 (1971), where it was noted: ". . . the award of back pay, as one element of the equitable remedy, conflicts in no way with the limitations of Rule 23(b)(2)."

Accordingly, the requirements of Rule 23 of the Federal Rules of Civil Procedure having been met, this Court finds that this action is a proper class action, and that the named parties adequately represent the class. It is hereby ordered that this action and both counts thereof may properly be maintained as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

The class in Count I shall consist of all persons who served as Judges of the United States Courts pursuant to Article III of the Constitution of the United States during

part or all of the period commencing October 1, 1976 and continuing to March 1, 1977.

The class in Count II shall consist of all persons who served as Judges of the United States Courts pursuant to Article III of the Constitution of the United States prior to July 11, 1977 and who continued to hold said office subsequent to commencement of the first pay period following October 1, 1977.

No Judge appointed after July 11, 1977 is a member of either class.

ENTER:

STANLEY J. ROSZKOWSKI, JUDGE
United States District Court

Dated: March 20, 1979

In the Supreme Court of the United States

No. 79-983

UNITED STATES,

Appellant,

v.

HUBERT L. WILL, ET AL.

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. In addition to the questions presented by the statement as to jurisdiction, the parties are directed to address the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court.

February 19, 1980

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1689

UNITED STATES OF AMERICA,

Appellant,

v.

HUBERT L. WILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

RELEVANT DOCKET ENTRIES

10/22/79	1	Filed 10/19/79 complaint and 4 copies
10/22/79	2	Filed 10/19/79 Civil Cover Sheet
11/1/79	3	Enter order dated 10/30/79: It is ordered that plaintiffs and/or their counsel shall be and hereby are permitted to notify potential class members of this lawsuit and their status as potential members of the plaintiff class, and to state plaintiffs views concerning the consequences of any actions the judges may take in response to the Memorandum of the Administrative Office.—(DRAFT)—Roszkowski, J. Mailed notices 11/1/79
11/2/79	4	Filed 11/1/79 Motion pursuant to Civil Rule 22 of this court for an order permit-

		ting plaintiffs and/or their counsel to communicate directly with potential class members.
11/5/79	5	Filed 11/2/79 Affidavit under Rule 39 for Plaintiff's attorneys Richard J. Prendergast and Kevin M. Forde with Contingency Fee Agreement attached.
11/8/79	6	Filed 11/7/79 Plaintiffs' Amended Complaint
11/8/79	7	Filed 11/7/79 Plaintiffs' Motion for class determination
11/9/79	8	Enter order dated 11/7/79: Leave is granted to plaintiffs to file Amended Complaint and motion for Class Determination. Plaintiffs shall file their Brief in Support of their motion for summary judgment and any reply to defendant's objections to the motion for Class Determination on or before November 26, 1979. Defendant shall file its Memorandum in Opposition to the Motion for Summary Judgment and any Cross Motion and Memorandum in Support thereof by December 10, 1979. Plaintiffs' reply due on December 17, 1979.—ROSZKOWSKI, J. Mailed notices 11/9/79 (DRAFT)
11/19/79		Filed 11/16/79 Request for exclusion as member of class by Senior Judge Hogan. (not available)
11/19/79	9	Filed 11/16/79 Defendant's *Answer to Amended Complaint*
11/26/79	10	Filed 11/21/79 Defendant's Opposition to motion for class action certification
11/27/79	11	Filed 11/26/79 letter to Clerk from Neil H. Koslowe dated 11/21/79 re refiling of answer on proper size paper with no changes.

11/27/79		Filed 11/26/79 defendant USA's answer (refiling on proper size paper). (not available)
11/27/79	12	Filed 11/26/79 plaintiffs' motion for summary judgment.
11/27/79	13	Filed 11/26/79 plaintiffs' memorandum in reply to defendant's opposition to class certification.
11/28/79	14	Filed 11/27/79 plaintiffs' memorandum in support of plaintiffs' motion for summary judgment.
11/28/79	15	Enter order dated 11/27/79: Leave is hereby granted both to plaintiffs and to defendant to file briefs in support of and in opposition to plaintiffs' motion for summary judgment in excess of 15 pages, and plaintiffs are hereby given leave to file their memorandum instanter. — Roszkowski, J Mailed notices 11/28/79
12/5/79	16	Filed 12/4/79 defendant's response to plaintiffs' reply to defendant opposition to class certification.
12/12/79	17	Enter order dated 12/11/79: By agreement of the parties the time within which defendant may file its memorandum in opposition to plaintiffs motion for summary judgment is extended to December 19, 1979. Plaintiffs may file their reply if any, to said memorandum on or before December 28, 1979. — Roszkowski, J Mailed notices 12/12/79
12/20/79	18	Filed 12/19/79 defendant's motion for summary judgment; memorandum of law in support of defendant's motion for summary judgment and in opposition to plaintiffs' motion for summary judgment.
1/10/80	19	Filed 12/21/79 plaintiffs' reply brief.

1/10/80	20	Filed 12/31/79 supplemental brief of plaintiffs in support of their motion for class certification; attachments
1/23/80	21	Filed 1/18/80 defendant's reply to supplemental brief of plaintiffs on plaintiffs' motion for class certification.
2/5/80	22	Enter order dated 1/31/80: Plaintiffs' motion for class certification is granted. Plaintiffs' motion for summary judgment is granted. Defendant's motion for summary judgment is denied. (DRAFT)—Roszkowski, J. Mailed notices 2/5/80 *JS-6*
2/15/80	23	Enter judgment pursuant to rule 58 dated 2/12/80.—by the clerk.
3/7/80	24	Filed 3/5/80 plaintiffs' motion pursuant to civil rule 22 of this court for an order permitting plaintiffs and/or their counsel to communicate directly with class members.
3/7/80	25	Enter order dated 3/5/80: Plaintiffs and/or their counsel are hereby granted leave to communicate directly with class members.—Roszkowski, J. Mailed notices 3/7/80
3/10/80	26	Filed 3/10/80 letter from Neil H. Koslowe to the Clerk dated 3/7/80 re notice of appeal.
3/10/79	27	Filed 3/10/80 defendant's notice of appeal to the Supreme Court, certificate of service. (no fee)
4/24/80	28	Filed 4/23/80 letter to the Clerk from Neil H. Koslowe dated 4/14/80 re Rule 12 of the Rules of The Supreme Court.
5/5/80	29	Enter order dated 4/28/80: The Clerk of the Court is directed to transmit the original documents in the above-captioned case to the Supreme Court of the United

States as the record on appeal pursuant to Rule 12 of the Rules of the Supreme Court.—Roszkowski, J.
Mailed notices 5/5/80

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 4368

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE B. HARRIS, IRIVING HILL, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, AND SPENCER WILLIAMS, ON THEIR OWN BEHALF AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,
Plaintiffs,

VS.

THE UNITED STATES OF AMERICA,
Defendant.

AMENDED COMPLAINT

Plaintiffs, by their counsel, complain on their own behalf and on behalf of all persons similarly situated, asserting the following as their claim against the United States:

COUNT I

JURISDICTION

1. This action arises under Article III of the Constitution of the United States. Plaintiffs invoke the jurisdiction of this Court under Title 28, United States Code, Section 1346(a)(2). The individual claim of plaintiffs and that of each member of the class they seek to represent does not exceed Ten Thousand Dollars ($10,000.00).

PARTIES

2. (a) Plaintiff JOHN R. BARTELS is a Senior United States District Judge and a member of the United States District Court for the Eastern District of New York.

(b) Plaintiff HENRY BRAMWELL is a United States District Judge and a member of the United States District Court for the Eastern District of New York.

(c) Plaintiff LLOYD H. BURKE is a United States District Judge and a member of the United States District Court for the Northern District of California.

(d) Plaintiff WILLIAM J. CAMPBELL is a Senior United States District Judge and a member of the United States District Court for the Northern District of Illinois.

(e) Plaintiff FRED J. CASSIBRY is a United States District Judge and a member of the United States District Court for the Eastern District of Louisiana.

(f) Plaintiff MARK A. COSTANTINO is a United States District Judge and a member of the United States District Court for the Eastern District of New York.

(g) Plaintiff JACK M. GORDON is a United States District Judge and a member of the United States District Court for the Eastern District of Louisiana.

(h) Plaintiff GEORGE B. HARRIS is a Senior United States District Judge and a member of the United States District Court for the Northern District of California.

(i) Plaintiff IRVING HILL is a United States District Judge and is Chief Judge of the United States District Court for the Central District of California.

(j) Plaintiff EDWARD R. NEAHER is a United States District Judge and a member of the United States District Court for the Eastern District of New York.

(k) Plaintiff THOMAS COLLIER PLATT, JR., is a United States District Judge and a member of the United States District Court for the Eastern District of New York.

(l) Plaintiff GEORGE C. PRATT is a United States District Judge and a member of the United States District Court for the Eastern District of New York.

(m) Plaintiff HUBERT L. WILL is a Senior United States District Judge and a member of the United States District Court for the Northern District of Illinois.

(n) Plaintiff SPENCER WILLIAMS is a United States District Judge and a member of the United States District Court for the Northern District of California.

3. Plaintiffs were appointed to their present offices

within the United States Judiciary by the President of the United States with the advice and consent of the United States Senate pursuant to Article III, Section 2 of the Constitution of the United States and have served as Federal Judges pursuant to Article III of the Constitution of the United States during the period commencing prior to October 1, 1978 through and including the filing of this action.

4. The defendant is the United States of America.

CLASS ACTION ALLEGATIONS

5. Count I of this action is brought by plaintiffs on their own behalf and as a class action on behalf of all persons who have served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to October 1, 1978, and who continued to hold said Office subsequent to commencement of the first pay period thereafter.

6. The Class which consists of more than 600 persons is so numerous that joinder of all its members before this Court is impracticable.

7. There are questions of law or fact common to the class.

8. The claims of plaintiffs are typical of the claims of the Class.

9. The named plaintiffs, with their counsel, will fairly and adequately protect and represent the interests of the Class.

10. The party opposing the Class has acted and has refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

CLAIM

11. Article III, Section 1 of the Constitution of the United States provides in pertinent part that Judges of

the United States Courts "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

12. The Compensation of a federal judge is defined in part at 28 U.S.C. §135 which provides in pertinent part that "Each Judge . . . shall receive a salary at an annual rate determined under Section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351–361) as adjusted by [the Executive Salary Cost-of-Living Adjustment Act]."

13. Under the Executive Salary Cost-of-Living Act (P.L. 94–82), 5 U.S.C. §5318 and 28 U.S.C. §461 enacted August 9, 1975, the annual rate of pay for positions at each level of the Executive Schedule (which schedule includes all federal judges appointed and serving pursuant to Article III, Section 1 of the United States Constitution) is required to be adjusted by a percentage equal to the average annual percentage increase in the General Schedule, granted pursuant to the Federal Pay Comparability Act of 1970, 5 U.S.C. §5305 et seq., which provides the mechanism for annually adjusting the rates of pay of most federal employees.

14. Pursuant to the herein described statutory scheme, the compensation of plaintiffs and each member of their Class consists of a stated salary augmented annually by a cost-of-living adjustment which takes effect the first pay period following October 1 of each year, including 1978. Only the actual amount of said cost-of-living adjustment remains undetermined until on or about October 1 of the applicable year, that to be ascertained on the basis of the average adjustment granted to General Schedule employees under the applicable provisions of the Federal Pay Comparability Act of 1970.

15. On September 30, 1978, P.L. 95–391 became law, providing in pertinent part that:

> No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the . . . judicial

> branch . . . at a rate which exceeds the rate . . . of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of title 5, United States Code . . .

Section 304(a)(1) of P.L. 95-391.

16. The lowest salary level of any federal judge was fixed at a rate equal to or greater than the rate of basic pay for level V of the Executive Schedule on September 30, 1978; accordingly, all Class members' salaries were affected by Public Law 95-391.

17. On October 7, 1978, the President of the United States issued Executive Order No. 12087, increasing by an average of 5.5% the rates of pay theretofore paid to plaintiffs and their Class, among others, pursuant to the applicable provisions of the Federal Pay Comparability Act of 1970 and the Executive Salary Cost-of-Living Act. Because of the prohibition set forth in Public Law 95-391, however, the 5.5% adjustment was not paid to federal judges as provided, notwithstanding those provisions of the Executive Salary Cost-of-Living Act, 5 U.S.C. §5318 and 28 U.S.C. §461, which require that the rates of pay of Judges be adjusted by a percentage equal to the average percentage increase in the General Schedule and notwithstanding the provisions of said Executive Order.

18. The Action of Congress in refusing to appropriate or otherwise withholding funds necessary to pay the full, lawful salary of federal judges did not suspend or repeal the statutory obligation to pay said obligations.

19. The failure and refusal to appropriate funds provided under the Executive Salary Cost-of-Living Act, as that Act pertains to federal judges, did not suspend or postpone the operation of the Cost-of-Living Adjustment Act and did not limit the rates of pay established thereunder. Thus the legal rate of pay for federal judges was increased by 5.5% effective October 1, 1978.

20. Plaintiffs and their Class are entitled to receive

their full statutory salary without regard to the efforts of defendant to limit said salary and without regard to defendant's refusal to pay this full statutory salary.

21. Public Law 95–391 and actions taken pursuant thereto have diminished the compensation of plaintiffs and their Class, in violation of Article III, Section 1 of the Constitution of the United States, and said actions, as applied to plaintiffs and their Class, are therefore unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief:

A. That this Court find that this action is a proper class action, and that the named parties adequately represent the Class.

B. That upon said findings, this Court order that this action may properly be maintained as a class action as the Class is defined by plaintiffs in this Complaint.

C. That this Court declare that the actions of the defendant as set forth in Court I of this Complaint violate the provisions of Article III, Section 1, which proscribes the diminution of judicial compensation.

D. That Public Law 95–391, as applied to plaintiffs and their Class, be declared unconstitutional.

E. That this Court declare that defendant's refusal to appropriate funds necessary to pay plaintiffs and their Class their full statutory salary is illegal and does not have the effect of limiting the obligation to pay said salaries.

F. That this Court order defendant, United States of America, to pay to plaintiffs individually and to each member of their Class all compensation due for the period October 1, 1978 to the date of judgment, by virtue of the diminution of their compensation in violation of Article III, Section 1 of the Constitution of the United States, and the other wrongs complained of.

G. That plaintiffs and each member of their Class recover whatever interest would have been earned on any compensation wrongfully withheld.

H. That plaintiffs recover the costs of this action and be granted such further relief as this Court deems just and appropriate.

COUNT II

1-4. Plaintiffs reallege, as paragraphs 1 through 4 of Count II, paragraphs 1 through 4 of Count I.

CLASS ACTION ALLEGATIONS

5. Count II of this action is brought by plaintiffs on their own behalf and as a class action on behalf of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to October 1, 1979 and who continued to hold said office subsequent to October 12, 1979.

6-10. Plaintiffs reallege, as paragraphs 6 through 10 of Count II, paragraphs 6 through 10 of Count I.

CLAIM

11. Article III, Section 1 of the Constitution of the United States provides in pertinent part that Judges of the United States Courts "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office".

12. The Compensation of a federal judge is defined in part at 28 U.S.C. §135 which provides in pertinent part that "Each Judge . . . shall receive a salary at an annual rate determined under Section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361) as adjusted by [the Executive Salary Cost-of-Living Adjustment Act]."

13. Under the Executive Salary Cost-of-Living Act (P.L. 94-82), 5 U.S.C. §5318 and 28 U.S.C. §461 enacted August 9, 1975, the annual rate of pay for positions at each level of the Executive Schedule (which Schedule includes all federal judges appointed and serving pursuant to Article III, §1 of the United States Constitution), is required to be adjusted by a percentage equal to the average annual

percentage increase in the General Schedule, granted pursuant to the Federal Pay Comparability Act of 1970, 5 U.S.C. §5305 et seq., which provides the mechanism for annually adjusting the rates of pay of most federal employees.

14. Pursuant to the herein described statutory scheme, the compensation of plaintiffs and each member of their Class consists of a stated salary augmented annually by a cost-of-living adjustment which takes effect the first pay period following October 1 of each year, including 1979. Only the actual amount of said cost-of-living adjustment remains undetermined until on or about October 1 of the applicable year, that to be ascertained on the basis of the average adjustment granted to General Schedule employees under the applicable provisions of the Federal Pay Comparability Act of 1970.

15. On August 31, 1979, the President of the United States proposed an average adjustment in the statutory pay rates for federal employees to become effective October 1, 1979, in the amount of 7%.

16. In addition, prior to October 1, 1979, the Congress passed and the President signed into law, an appropriation [P.L. 96-86] for the payment of salaries of federal judges which did not include any limitation upon the use of funds to pay the full salary of federal judges provided by law.

17. On September 30, 1979 the purported restriction on the use of appropriated funds contained in Section 304 of P.L. 95-391 and referred to in paragraphs 15-18 of Count I of this Complaint, expired. Therefore effective October 1, 1979 the adjustments provided for in Executive Order 12087, referred to in paragraph 17 of Count I above, became payable without limitation.

18. Accordingly, on October 1, 1979, any prior limitation on the availability of funds to pay the October 1, 1978 adjustment—whether lawful or unlawful—was of no further effect, and the October 1, 1979 adjustment also went into effect. The aggregate of these adjustments results in a total adjustment of 12.9%.

19. Commencing October 1, 1979, the salary of plaintiffs and their Class was adjusted as set forth in paragraph 18 above, and funds were and are available to pay plaintiffs and their Class at the "adjusted" rates.

20. On October 12, 1979, the Congress adopted P.L. 96-86, which provides in pertinent part:

> For the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year.

21. Because of and relying on the adoption of P.L. 96-86, defendant has refused to pay plaintiffs and their Class the full compensation to which they are lawfully entitled.

22. P.L. 96-86, by its terms, did not suspend or postpone the operation of the Cost-of-Living Adjustment Act, did not limit the rates of pay established and already in effect thereunder, and did not abrogate the duty to pay plaintiffs and their Class their full compensation as required by law.

23. On its face and by its own terms P.L. 96-86 does not apply to plaintiffs and their Class.

24. By enactment of P.L. 96-86 and by its continued refusal and failure to pay plaintiffs and plaintiffs' Class the full statutory compensation to which they are entitled commencing October 1, 1979, and continuing through this date under 5 U.S.C. §5305, 5 U.S.C. §5318 and 28 U.S.C. §461, defendant has violated and continues to violate that provision of Article III, Section 1 which proscribes the diminution of the compensation of a federal judge during this continuance in office.

25. That P.L. 96-86 is unconstitutional is clear, for in failing and refusing to pay the full salary of Judges of the United States appointed pursuant to Article III, Section 1, Congress has reduced and diminished their compensa-

tion as established by law, in clear violation of Article III, Section 1 of the Constitution of the United States.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief:

A. That this Court find that this action is a proper class action and that the named parties adequately represent the Class.

B. That upon said findings, this Court order that the action may properly be maintained as a class action as the Class is defined by plaintiffs in this Complaint.

C. That this Court declare that the actions of the defendant as set forth in Count II of this Complaint violate the provisions of Article III, Section 1 which proscribes the diminution of judicial compensation.

D. That P.L. 96-86 as applied to plaintiffs and their Class be declared unconstitutional.

E. That this Court declare that plaintiffs and their Class are entitled to compensation as set forth in this Count II of the Complaint and defendant's actions to limit or otherwise refuse to pay said compensation are illegal and of no lawful effect.

F. That this Court order defendant, the United States of America, to pay to plaintiffs individually and to each member of their Class all compensation due for the period October 1, 1979 through the date of judgment and satisfaction in this action.

G. That plaintiffs and each member of their Class recover whatever interest would have been earned on any compensation wrongfully withheld.

H. That plaintiffs recover the costs of this action and be granted such further relief as this Court deems just and appropriate.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 79 C 4368

HUBERT L. WILL AND WILLIAM J. CAMPBELL,
Plaintiffs,

v.

UNITED STATES OF AMERICA
Defendant.

ANSWER

Defendant, United States of America, answers the amended complaint as follows:

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

With respect to the numbered paragraphs of Count I of the complaint:

1. Deny, except to admit that if the individual claims of the plaintiffs and that of each member of the putative class they seek to represent do not exceed $10,000 in amount, the jurisdiction of this Court would be properly invoked under 28 U.S.C. 1346(a)(2) (1976).

2-3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

4. Admit.

5. This paragraph contains plaintiffs' characterization of this action as to which no answer is required, but if an answer is deemed required, deny.

6-10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

11-13. These paragraphs quote from or restate provisions of the Constitution and the United States Code, and the Court is respectfully referred to those provisions for full statements of their contents.

14. Deny.

15. This paragraph quotes from provisions of Public Law No. 95-391, and the Court is respectfully referred to that law for a full statement of its contents.

16. Deny, except to admit that the provisions of Public Law No. 95-391 applied to all judges appointed under Article III of the Constitution.

17. Deny, except to admit that Article III judges were not paid any salary increase during fiscal 1978.

18-21. These paragraphs contain conclusions of law and not allegations of fact to which answers are required, but if answers are deemed required, deny.

THIRD DEFENSE

With respect to the numbered paragraphs of Count II of the complaint:

1-4. Defendant repeats the answers given in its second defense as to numbered paragraphs 1-4 of Count I.

5. This paragraph contains plaintiffs' characterization of this action as to which no answer is required, but if an answer is deemed required, deny.

6-14. Defendant repeats the answers given in its second defense as to numbered paragraphs 6-14 of Count I.

15. Deny, except to admit that on August 31, 1979, the President transmitted to Congress an alternative pay plan under 5 U.S.C. 5305(c)(1) (1976), providing for a 7% increase in rates of pay at each grade for most employees paid under the federal statutory pay systems, including Article III judges.

16. Deny, except to admit that the Judiciary Appropriation Act, 1980, Public Law No. 96-86, 93 Stat. 427, which became effective on September 24, 1979, appropriates

money for salaries of Article III judges during the fiscal year October 1, 1979, through September 30, 1980.

17. Deny, except to admit that the provisions of Public Law No. 95-391 were in effect during the fiscal year October 1, 1978, through September 30, 1979.

18. Deny, except to admit that under the Executive Salary Cost-of-Living Adjustment Act, 28 U.S.C. 461 (1976), and the Pay Comparability Act, 5 U.S.C. 5305(c)(2), (n) (1976), the alternative pay plan transmitted by the President to Congress on August 31, 1979, became effective for Article III judges on October 1, 1979.

19. Deny, except to admit that the alternative pay plan transmitted by the President to Congress on August 31, 1979, became effective for Article III judges on October 1, 1979.

20. This paragraph quotes from Public Law No. 96-86, and the court is respectfully referred to that law for a full statement of its contents.

21. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

22. Deny.

23. Deny.

24-25. These paragraphs contain conclusions of law and not allegations of fact to which answers are required, but if answers are deemed required, deny.

Defendant also denies the prayers for relief in Counts I and II of the amended complaint, and also specifically denies all of the allegations of the amended complaint not previously answered.

Having fully answered the amended complaint, defendant prays that this action be dismissed and that the Court grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 1979, I served the foregoing Answer upon counsel for plaintiffs, by causing a copy to be mailed, postage prepaid, to:

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NEIL H. KOSLOWE
Attorney

Supreme Court of the United States

No. 79-1689

UNITED STATES, APPELLANT,

v.

HUBERT L. WILL, ET AL.

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The motion of the Solicitor General to consolidate this case with No. 79-983, *Will* v. *United States*, for briefing and oral argument is granted. A total of one and one-half hours is allotted for oral argument.

June 16, 1980

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Supreme Court, U. S.
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No. 79-983

In the
Supreme Court of the United States
OCTOBER TERM, 1979

UNITED STATES OF AMERICA,
Appellant,

vs.

HUBERT L. WILL, et al.,
Appellees.

On Appeal from the United States District Court for The Northern District of Illinois.

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-983

UNITED STATES OF AMERICA,

Appellant,

vs.

HUBERT L. WILL, et al.,

Appellees.

On Appeal from the United States District Court for The Northern District of Illinois.

MOTION TO AFFIRM

JURISDICTION

Appellees agree with appellant that this Court has jurisdiction to hear all issues in this cause. They also agree that the Justices of this Court are not barred from participating in the disposition of this case and that this Court can and should hear the appeal.[1] They submit, however, that the Questions Presented are not substantial and are controlled by well-settled precedents. Accordingly,

---

[1] Jurisdictional Statement (hereinafter, "J.S.") at 17, n. 12.

appellees respectfully move the Court to affirm, the judgment of the district court being so obviously correct that further review or argument is not warranted.

QUESTIONS PRESENTED

1. Whether the proviso contained in the Legislative Branch Appropriations Act of 1977 (Pub. L. No. 94-440, 90 Stat. 1439, 1446) (October 1, 1976), restricting the use of funds, served to supercede or amend provisions of the Federal Salary Act (Pub. L. 90-206, 2 U.S.C. 351-361, Section 225, 81 Stat. 642-45) [hereinafter "Salary Act"] and the Executive Salary Cost-of-Living Adjustment Act (Pub. L. No. 94-82, 89 Stat. 419 [hereinafter "Adjustment Act"]?

2. Assuming question 1 is answered in the affirmative, whether the cost-of-living adjustments prescribed in the Adjustment Act which went into effect for Article III judges on October 1, 1976, constitute a portion of a judge's "Compensation" within the meaning of the Compensation Clause, Article III, Section 1?

3. Whether Pub. L. No. 95-66, adopted July, 1977, had the effect of superceding, rescinding or amending the provisions of the Salary Act and the Adjustment Act?

4. Assuming question 3 is answered in the affirmative, whether the right to cost-of-living adjustments prescribed in the Adjustment Act constitutes a portion of a judge's "Compensation" within the meaning of the Compensation Clause, Article III, Section 1?

5. Assuming judges' Compensation has been directly diminished, whether appellees must demonstrate that the diminution was a part of a discriminatory attack upon

Article III judges with the designed purpose or effect of undermining their independence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause, Article III, Section 1 of the Constitution, provides:

> The Judges, both of the supreme and inferior Courts shall hold their Offices during good Behavior and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The pertinent portions of the statutes involved are set forth in Appendix E of Appellant's Jurisdictional Statement. Additionally, the Court may take judicial notice of similar restrictions on the use of appropriated funds enacted for fiscal years 1979 and 1980 (Pub.L. 95-391 and Pub.L. 96-86) which are set forth in Appendix A to this Motion *infra* at pp. 1a-2a.

SUMMARY OF ARGUMENT

As appellant suggests, it may be unnecessary in this case to address the constitutional claims asserted by plaintiffs-appellees, but this is true only if the district court is affirmed on other grounds. If the non-constitutional issues are resolved in appellant's favor, consideration of the constitutional issues is necessary.

The initial question thus concerns whether the challenged legislation—a single sentence in the lengthy Legislative Branch Appropriations Act of 1977 [Pub. L. 94-440; October 1, 1976], and a statute enacted in July of 1977, prohibiting payment of the salary adjustment pay-

able at the commencement of the 1978 fiscal year [Pub. L. 95-66]—repealed the fiscal 1977 and/or fiscal 1978 cost-of-living adjustments otherwise payable by operation of the Adjustment Act. The solidly established rule in this regard is that funding limitations relate solely to the use of appropriated funds, and do not constitute amendments to or repeals of existing statutes under which specific rights and duties are defined. This conclusion follows from a related rule, equally well-established, which is not confined to appropriations law: amendments to and repeals of existing statutes must be explicit; amendment by implication is not favored.

Application of these rules of statutory construction in the instant case is particularly appropriate in light of the position taken by the Acting Comptroller General (that the funding limitation contained in Pub. L. 94-440 "does not effect the legal rate" and "does not suspend or postpone the operation of" the Adjustment Act), and the actions taken by the President (in acknowledging by Executive Order that the lawful rates for fiscal 1977 were the *adjusted* salary levels). Further support, with respect to the limitations imposed both for fiscal 1977 and fiscal 1978, is found in subsequent enactments relative to the Adjustment Act for the fiscal years 1979 and 1980. The latter enactments represent a virtual concession that Congress has chosen to withhold payment rather than to amend the Adjustment Act. For example, Congress (by the terms and language of Pub. L. 96-86; October 12, 1979), and appellant (in related litigation) have conceded that the similar limitation for fiscal 1979 (contained in Pub. L. 95-391) was merely a limitation on the use of funds appropriated for fiscal 1979 and did not prevent the adjustment from taking effect.

Assuming that the Adjustment Act was not substantively amended, the statutory right to the adjustments was not extinguished by either of the enactments under consideration. Since it is unquestioned that a suit will lie for the payment of an unfunded obligation, and there being no genuine issue as to any material fact, affirmance is warranted by the straight-forward application of the foregoing principles of statutory construction.

In the event that either Pub.L. 94-440 or Pub.L. 95-66 is understood to have rescinded the right to the adjustment mandated under the Adjustment Act, it becomes necessary to consider whether that right is part of the judges' compensation which, under the unqualified proscription of the Compensation Clause of Article III, Section 1, is protected against diminution. Since the adjustment for fiscal 1977 became payable October 1, 1976 and the appropriations limitation contained in Pub.L. 94-440 was not signed into law until later that day, that proviso (if it had any substantive effect on pay levels) resulted in a rollback in pay to the pre-October 1, 1976 salary levels. That Article III, Section 1 prohibits absolutely such action is manifest.

In the context of Pub.L. 95-66 (again, assuming that it is viewed as having substantively affected the statutory right to an adjustment), the question presented is whether the compensation of a judge includes the right to an adjustment. Appellees submit that it clearly does.

First, the Adjustment Act unequivocally *requires* and thus guarantees that judges shall be paid an annual adjustment measured by the average adjustment received by most other federal employees under the Federal Pay Comparability Act of 1970, 5 U.S.C. §5305, et seq. Second,

Congress has explicitly defined the adjustment as part of the salary component of a judge's compensation, e.g. 28 U.S.C. §135: "Each judge of a district court of the United States shall receive a salary at an annual rate determined under Section 225 of the Federal Salary Act of 1967 . . . as adjusted by [the Adjustment Act]".

Third, each year since 1976, Congress has enacted legislation providing that the adjustment in salary to which judges are entitled would not be funded. If the compensation scheme did not create an existing right to the adjustment mandated under the Adjustment Act, such annual limitations on the use of appropriated funds would be unnecessary. As previously noted, the adjustment which took effect October 1, 1978 was not extinguished by passage of the appropriations limitation contained in Pub. L. 95-391. Even appellant has conceded, in related litigation, that the full compensation, as adjusted October 1, 1978, became payable at the expiration of the 1979 fiscal year. Were the right to an adjustment "contingent" and not "vested", as appellant argues, judges' compensation would not have become payable at the adjusted level when the fiscal year limitation expired October 1, 1979. It cannot be argued that the right was "contingent" for fiscal years 1977 and 1978, and was "something else" the following year.

Fourth, for purposes of achieving the objectives of Article III, Section 1, the term "compensation" must extend to an annual adjustment in salary, where that adjustment has been guaranteed in advance under a specific statutory formula. Otherwise, the promised adjustment might be withheld for any of the reasons sought to be obviated by the Constitution's unequivocal pro-

scription against diminution. For this reason, similar provisions of state constitutions, considered against similar efforts to withhold the payment of annual cost-of-living adjustments, have been interpreted to include the right to such adjustments within the meaning of the term "compensation." Indeed, perhaps the earliest judicial decision on the subject held that fees then paid to District of Columbia judges, the sum total of which could not be ascertained prior to the performance of the judicial functions for which they were earned, were a component of the judges' compensation protected under Article III, Section 1.

Accordingly, appellees submit that there is nothing novel or remarkable in their understanding that, since enactment of the Adjustment Act in 1975, the right to the adjustment provided therein has been an integral part of judges' compensation.

Finally, appellant contends that it is permissible to withhold a portion of a federal judge's compensation so long as judges are not the object of discrimination. This novel theory is one which no court has embraced, and which this Court has rejected in the context of a similar direct diminution of a judge's compensation. Moreover, Congress has explicitly recognized that discriminatory treatment is not a relevant consideration in the constitutional protection afforded judges, both during the Great Depression (when all federal employees' salaries were lowered, except those of judges), and in the Adjustment Act which specifically exempts judges from any downward cost-of-living adjustments which might be imposed on other federal employees.

STATEMENT

The facts in this case are neither complicated nor disputed. All of the essential facts of plaintiffs' Complaint were admitted. Appellant's Answer disputed only the legal conclusions drawn from those facts. There is no genuine issue as to any material fact.

Moreover, appellees respectfully submit that, while the outcome of this case is of profound importance to the maintenance of the separation of powers in our government and the preservation of the independence of the judiciary,[2] the issues presented in this appeal are neither complicated nor substantial. The resolution of these issues is controlled by long settled principles. They concern the effect, if any, on judicial salaries of the enactment of certain legislation in 1976 and 1977 withholding and refusing to provide funds for fiscal 1977 and 1978, respectively.[3]

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[2] The very fact that Judges of the United States Courts find it necessary to litigate to preserve the independence of their office is itself of historic significance.

[3] Throughout its Jurisdictional Statement, appellant improperly characterizes the challenged legislation as the "Pay Acts" of 1976 and 1977.

The first statute challenged (which appellant refers to as the 1976 Pay Act) was the 1977 Legislative Branch Appropriations Act. That Act had nothing whatsoever to do with prescribing the "pay" of federal judges, which was established by the Salary Act and the Adjustment Act. The adjustment for that year was set by the President and was not disapproved by Congress. Judicial salaries were funded by the Appropriations Act for the Judiciary, approved by the President July 14, 1976. (Pub. L. 94-362, 90 Stat. 952.) Later the Legislative Branch Appropriations Act purported to prohibit funding of these

The compensation of a federal district judge is defined in part at 28 U.S.C. §135 as follows:

> Each judge . . . shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title [i.e., the Executive Salary Cost-of-Living Adjustment Act].

Similar provisions apply to the compensation of other Article III Judges. See 28 U.S.C. §§ 5, 44(d), 213, and 252.

The central issues in this case involve the Adjustment Act which, since 1975, has provided that the salaries of executive level federal employees, including judges, shall be adjusted annually in an amount measured by the average adjustment in General Schedule salaries as determined under the Federal Pay Comparability Act of 1970 [hereinafter the "Comparability Act"] 5 U.S.C. §5305, et seq. These percentage adjustments are submitted to Congress by the President, and for judges, become payable, without further action by Congress, on October 1 of each year (the first day of the fiscal year), unless within 30 days of their submission either House of Congress adopts a resolution disapproving the President's report.[4] But

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[3] (Continued)
adjustments. But the adjustments remained, as will be shown below.
Similarly, the Act referred to by appellant as the "1977 Pay Act" (Pub. L. 95-66) prohibited payment of the fiscal 1978 adjustment.

[4] In which case the President must follow the recommendations of the Advisory Committee on Federal Pay. 5 U.S.C. §5305(c)(2).

Congress has refused to fund the adjustment in four of the five years since enactment of the Adjustment Act. Only the first adjustment in the amount of 5% for fiscal 1976 (effective October 1, 1975) was paid. This adjustment, which marked the first increase in judicial compensation in more than six years, was fully funded. (That adjustment increased the salary of a district judge from $40,000 to $42,000.)

For fiscal year 1977 (commencing October 1, 1976), the annual rates of pay for General Schedule employees were increased by an average of 4.8%. The same adjustment was applied to Executive Schedule salaries, including those of federal judges. The annual salary of district judges was thereby established at $44,000. This adjustment was set out in Executive Order 11941 issued by the President on October 1, 1976.[5] In the district court, appellant acknowledged that "at least for a few hours" judges were earning adjusted amounts, *i.e.*, $44,000 for district judges.[6]

Later that same day, October 1, 1976, the Legislative Branch Appropriations Act of 1977, P.L. 94-440 (hereinafter "1977 Appropriations Act"), was signed by the President. Among other things, the 1977 Appropriations Act imposed a limitation on funds available to pay the full salary to which federal judges were entitled by law. Specifically, the Act provided that none of the funds appropriated

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[5] The issuance of an Executive Order is not critical to the adjustment going into effect. As noted above, these adjustments go into effect automatically.

[6] See discussion at Pp. 22-23 and n. 23 *infra*.

in that Act or any other Act could be used to pay salaries for certain positions, including judges, at a rate which exceeded the rate in effect on September 30, 1976, the last day of the previous fiscal year. For district court judges, this proviso is interpreted by appellant to limit their salaries to $42,000, the amount applicable in the prior fiscal year. The effect and legality of this limitation in the 1977 Appropriations Act is the subject of Count I of the Complaint.

Effective July 11, 1977, Congress passed Pub.L. 95-56 providing in pertinent part that any adjustment in Executive Schedule salary levels, including judicial salaries, which ordinarily would go into effect on October 1, 1977, "shall not take effect." Because of this limitation the adjustment of 7.2% which became payable for General Schedule employees was not applied to judicial salaries. The legality of this limitation is the subject of Count II of the Complaint.

On September 30, 1978, Congress passed the 1979 Legislative Branch Appropriations Act. That Appropriations Act contained a proviso restricting the use of funds to pay adjustments which was virtually identical to that contained in the 1977 Appropriations Act discussed above. (See Pub.L. 95-391, §304(a)(1), Appendix A, p. 1a) (The Adjustment effective October 1, 1978 was 5.5%.) The effect, if any, of this limitation on judicial compensation is presently being litigated.[7] It is understood by all interested government agencies, the Congress and appellant that this limitation was tempo-

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[7] Hubert L. Will et al. v. United States, (79 C 4368, N.D. Ill.) (hereinafter referred to as "*Will II*"). This is the litigation referred to by appellant at J.S. 14, n. 9.

rary only and lapsed at the termination of the fiscal year on September 30, 1979. The judges' right to the 5.5% adjustment on October 1, 1979 is undisputed. Appellant has so conceded in the pending district court case.[8]

Accordingly, on October 1, 1979 the limitation imposed in October 1978, if ever valid, expired. Additionally, a fiscal 1980 adjustment of approximately 7% became payable on that date. The aggregate of the fiscal 1979 and 1980 adjustments resulted in a total adjustment of 12.9% over the rates actually being paid judges at that time. On October 12, 1979, Congress adopted Pub.L. 96-86, a Joint Resolution intended to provide appropriations for certain agencies, which included a proviso that, for the fiscal year 1980, "funds available for payment to executive employees . . . who under existing law are entitled to aproximately 12.9 percent increase in pay, shall not be used to pay any such employee or . . . official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year." This limitation is also the subject of the pending litigation (*Will II*). In that litigation, appellant has conceded that

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[8] In its "Memorandum of Law in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment" filed on December 17, 1979 in *Will II*, appellant states:

> The 1979 Pay Act was an appropriations measure expiring at the end of the fiscal year, and it extinguished the 1979 cost-of-living increase only during fiscal 1979 which ended on September 30, 1979. (p. 4, n. 3.)
>
> On October 1 the 1979 Pay Act expired, and those individuals subject to §304(a), including . . . judges became entitled to the 1979 cost-of-living increase of 5.5%. (p. 11.)

the application of the proviso to judges results in a direct diminution of their compensation.[9] Nevertheless, the judges' right to this compensation is challenged by appellant for substantially the same reasons asserted here.

In the Court below, appellees contended that the limitations contained in Pub.L. 94-440 and Pub.L. 95-66 did not have the effect of altering or amending the statutory salary of judges, and that the adjustments of 4.8% (fiscal 1977) and 7.2% (fiscal 1978) went into effect, but have not been paid. Appellees also contended that, if these limitations did prevent the adjustments from taking effect, they were in violation of the Compensation Clause, and were therefore unconstitutional.

The district court granted summary judgment in favor of appellees on both counts of the Complaint, and entered judgment for the fiscal years 1977 and 1978.

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[9] *Id.* at Pp. 3, 4, 12, 23.

ARGUMENT

I. The Non-Constitutional Issues. We agree with appellant that this case may be resolved on nonconstitutional grounds.[10] As noted above, the October 1, 1976 adjustment of 4.8% went into effect for judges on that date. (See pp. 10-11, *supra.*) Later that same day, the President signed the 1977 Legislative Branch Appropriations Act [Pub.L. 94-440]. That Act contained a proviso restricting the use of appropriated funds to pay certain salaries in excess of the amount paid in the prior fiscal year, ended September 30, 1976. The simple issue presented, with respect to this enactment, is whether the restriction on the use of appropriated funds contained in the Appropriations Act (which was signed into law "at least . . . a few hours" after judges were working at the adjusted rate) effectively repealed the adjustment.

The President thought it did not. Simultaneous with his signing of the Appropriations Act bearing the restriction, he issued his Executive Order (11941) setting forth the salary rates, *as adjusted.*[11] The President's Order appropriately includes a caveat that "by virtue of the Legislative Branch Appropriations Act" funds are not available to pay the full salary.[12]

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[10] J.S. at 17. We also agree that the Court has jurisdiction to hear and decide the non-constitutional questions presented by this appeal. (J.S., 17 at n. 13)

[11] 3 C.F.R. 151 (1976 Comp.) See Schedule 7. The salary of a district judge is listed at $44,000.

[12] Federal law reporters also reflect the understanding that the adjusted salary was proper. See e.g., West Publishing Company, "Federal Rules, Civil Procedure,

The Administrative Office of the United States Courts thought it did not. In a Bulletin[13] issued immediately following the legislative action, it advised all judges that pursuant to the provisions of the Adjustment Act, their salaries *were adjusted.* It further advised that, because of the restriction in the 1977 Legislative Branch Appropriations Act, funds were not available to pay rates in excess of those in effect in the prior year, ended September 30, 1976.

The Acting Comptroller General said it did not. Even before the "limitation" was adopted, he issued an Opinion in response to a congressional inquiry, that, notwithstanding the (then proposed) limitation in the Appropriations Act, the adjustments provided for under the Adjustment Act would go into effect on October 1, 1976, since the "limitation" did not amend or repeal the Adjustment Act, but merely served to temporarily limit the availability of appropriated funds to pay the adjustments:

> The language [of the Act] *does not suspend* or postpone the operation of Public Law 94-82 [the Adjust-

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[12] (Continued)

Evidence, Appellate Procedure and Title 28 U.S. Judicial Code" which states in the notes following Section 135: "Salaries of district judges *increased* to $44,000 effective on the first day of the first pay period beginning on or after October 1, 1976." (Emphasis supplied.)

The authors add the caveat contained in the Executive Order that funds are not available to pay the full rate.

[13] Bulletin No. 492, Supplement No. 24, issued October 11, 1976. The salary of a district judge is shown as $44,000. See Appendix B, 3a-4a.

ment Act] and it *is not therefore a limitation on the rates of pay established thereunder.* The language sets a limitation on the use of funds. By its terms it restricts the use of funds otherwise available. . . ." (Emphasis added.)[14]

Advised of the Comptroller General's determination in this regard, Congress proceeded to enact the limitation.

The most convincing argument was still to come, however. Two years later, this scenario was replayed almost verbatim when the October 1, 1978 adjustment was considered. Prior to October 1, 1978, the President submitted an adjustment of 5.5% for all General Schedule and Executive employees for fiscal 1979. Again, Congress included in the Legislative Branch Appropriations Act a proviso withholding funds. Again, the President issued his Executive Order showing salaries as adjusted, with the caveat that funds were not available to pay the stated amount.[15]

This time, however, there is no dispute but that the limitation was temporary only, and was not intended to repeal, amend or substantively alter the Adjustment Act. This time, the President,[16] the Congress[17] the Office

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[14] 122 Cong. Rec. 31860-31861 (1976) Significantly, the Office of the Comptroller General reached this conclusion without regard to whether any person affected by the adjustment worked "for a few hours," or for any period, under the adjusted rates.

[15] Executive Order 12087, 43 Fed. Reg. No. 197, Oct. 11, 1978.

[16] Id.

[17] See also discussion of and quotation from Pub. L. 96-86 at pp. 22-23, infra.

of Personnel Management,[18] and Appellant agree that this "limitation" was temporary only. As conceded by Appellant in *Will II*:

> The 1979 Pay Act was an appropriations measure expiring at the end of the fiscal year, and it extinguished the 1979 cost-of-living increase only during fiscal 1979 which ended on September 30, 1979.[19]

Appellant cites *United States* v. *Larionoff*, 431 U.S. 864, 879 (1977) principally for the proposition that Congress may prospectively reduce the pay of government employees. More significant is the holding in that case. This Court held that the servicemen-plaintiffs in that case were entitled to a re-enlistment bonus even though the bonus for their specialty was abolished before their re-enlistment period began and before they were eligible to receive it. The Court noted that the servicemen had already earned the right to the bonus, "even though the date on which the bonus was to paid had not yet arrived." This Court added the caveat that, "if Congress had such an intent, [to divest the servicemen of the prospective bonus], serious constitutional questions would be presented." (Id. at 879)

Appellant's argument here is even more tenuous, for the congressional action which is claimed to have abolished the judges' right to their adjustment is found in an appropriations act. This Court has consistently held that "the intention of the Legislature to repeal must be clear and

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[18] See FPM Letter 531-54 dated Oct. 12, 1979, and FPM Bulletin 534-5, dated November 15, 1979.

[19] Memorandum of Law in Support of Defendant's Motion For Summary Judgment and in Opposition to Plaintiffs' Motion For Summary Judgment, p. 4, n.3.

manifest," *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936), as "repeals by implication are not favored," *Morton* v. *Mancari,* 417 U.S. 535, 549 (1974). Very recently, this Court had occasion to emphasize that "the policy [against repeals by implication] applies with even greater force when the claim to repeal rests solely on an Appropriations Act" *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 190 (1978). There the Court noted that both Houses of Congress have rules against the amendment of existing legislation in appropriations bills. (Id. at 191.)[20]

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[20] In *United States* v. *Dickerson,* 310 U.S. 554, 555 (1940), relied upon by appellant, the provisions of an Appropriations Act were found clearly to intend a continued suspension of benefits under the statute providing for re-enlistment bonuses. This Court held that the limitation there was more than a temporary restriction on the use of funds. It was part of a program that continued over six years. The first four years other Acts had specifically provided that the payment of enlistment allowances "*is hereby suspended.*" Here we have demonstrated that to the contrary, the limitation only served to temporarily restrict the use of funds. Compare also *Gibney* v. *United States,* 114 Ct. Cl. 38 (1949); *Lovett* v. *United States,* 66 F.Supp. 142 (Ct. Cl. 1945); *Geddes* v. *United States,* 38 Ct. Cl. 428 (1903); *Byron Brown Ralston* v. *United States,* 91 Ct. Cl. 91, cert. den. 311 U.S. 687 (1940); *State of Louisiana* v. *Weinberger,* 369 F.Supp. 856, 860 (E.D. La. 1973); *Concerned Residents of Buck Hill Falls* v. *Grant,* 537 F.2d 29 (3d Cir. 1976); see also *New York Airways, Inc.* v. *United States,* 369 F.2d 743, 748 (Ct. Cl. 1966) ("It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing expressly or by clear implication, the substantive law, does not in and of itself defeat a government, obligation created by statute.") All of these cases supporting appellees position were cited and discussed in appellees' briefs in the district court. Appellant made no effort to distinguish or demonstrate the inapplicability of a single one.

Appellant suggests (J.S. at 18) that its reading of the limitation (that a substantive change was intended) is preferred because we should not lightly presume that Congress would act to deny funds to satisfy "acknowledged lawful obligations under the Adjustment Act."[21] We respectfully submit that any notion that Congress would "not lightly" deny funds to satisfy such acknowledged obligations was disabused when Congress knowingly and admittedly did precisely that in its most recent adoption of the limitation on October 12, 1979, where it recited in the statute (Pub.L. 96-86) that judges were *entitled* to the adjustment—and then simply refused to provide the funds for full payment.

With respect to the October 1, 1976 Adjustment, appellant refers to the legislative history in an attempt to demonstrate that Congress intended a substantive change in the law and not just a temporary restriction. Appellees disagree. The legislative history shows only that Congress was sensitive to the political consequences of *accepting* a wage adjustment during the fiscal year ending September 30, 1977. The action, in restricting the payment, is totally consistent with Congress' political objectives.[22]

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[21] J.S. at 18.

[22] The legislative history of Pub.L. 94-440 evinces only a Congressional intent that *members of Congress* should go on public record either in favor of or against a pay increase for *members of Congress* and should not rely upon automatic increase provisions. In short, the legislative history of the Act is supportive of the proposition that an increase in compensation for a member of Congress is a political consideration of both Houses, especially in an election year.

Of noteworthy interest are the comments of Representative Wirth, with respect to "legislating by appro-

This Court has cautioned in the past against attempting to determine legislative intent from the comments or speeches of a Member of Congress. Rather than relying on such out-of-context comments, appellees submit that the express language demonstrates that the intent of Congress was merely to restrict the use of funds. The opposing interpretation urged by appellant is: (1) contrary to the opinion of the President; (2) contrary to the opinion of the Comptroller General; (3) contrary to the opinion of the Administrative Office of the United States Courts; (4) contrary to the opinion of the Office of Personnel Management interpreting virtually identical subsequent legislation; (5) contrary to the opinion of the Congress in interpreting virtually identical subsequent legislation; (6) contrary to the position taken by appellants in litigation involving the subsequent legislation; (7) con-

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[22] (Continued)

priation." The Congressman emphasizes the distinction between legislation and appropriation, and stresses that the latter only deals with the level of funds to be spent on policies which were otherwise authorized. Thus, the policy of Congress with respect to *judicial* salaries was expressed in the Salary Act and the Adjustment Act.

Finally, Senator Hollings has some interesting comments on the "undraftsmanlike" appearance of the Shipley Amendment. He states:

> "What it simply says is that none of the funds contained in this Act shall be used for increases in salaries for members of the House of Representatives pursuant to Section 204 a of Public Law 94-82. That was the Shipley amendment.
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> "It did not say that the salaries would not be increased under the law, but that the funds could not be used for any increases. The basic law is still there. There is a lawsuit about some of those already frozen, and we will apparently have another suit under this one." 122 Cong. Rec. S. 15341 (1976).

trary to the presumption against the implied repeal or suspension of existing legislation, particularly when the claimed repeal rests on an apropriations act; and (8) contrary to the rules of both Houses.

In short, appellees respectfully submit that the restriction on the use of funds found in the 1977 Legislative Branch Appropriations Act did not extinguish judges' rights to an adjustment, but only temporarily withheld payment of the adjustments. It is clear that a suit to collect payment of such unfunded obligations will lie. *See* note 20, *supra*.

Likewise, appellees submit that the statute enacted to restrict the adjustment payable for fiscal 1978 (Pub.L. 95-66, July 11, 1977) did not amend the Adjustment Act, particularly when read against the history of the Adjustment Act and considering the well-established presumption against amendments and repeals by implication. For fiscal 1978, had Congress intended to effect a repeal of the Adjustment Act, it could have attempted to do so by the use of clear and unequivocal statutory language. It did not.

Accordingly, appellees respectfully submit that the Adjustment Act was not impliedly or explicitly repealed by the fiscal year 1977 or 1978 enactments. This conclusion is an entirely valid basis for affirmance.

II. The Limitations Resulted In A Diminution Of Judges' Compensation.

Appellant next contends that, assuming this Court concludes that the limitations discussed above effectively prevented the adjustment of judges' salaries, these limitations did not "diminish" the compensation of Article III judges within the meaning of the Compensation Clause.

Its theory is based on the contention that the right to an increase under the Adjustment Act is "contingent" only and does not "vest" or is not "earned" by a judge until October 1 of each year. Until that time, appellant contends, there is "only an expectancy" which is not constitutionally protected. (J.S. at 24.)

Again, the district court was clearly correct in rejecting this contention and the argument advanced by appellant raises no issue requiring further hearing. First, the adjustment due October 1, 1976, clearly did "vest." In the district court, appellant conceded the validity of the argument that at least for "several hours during October 1" judges were entitled to the adjustment.[23] It now takes a

[23] Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and Reply to Plaintiffs' Opposition to Defendant's Motion for Judgment on the Pleadings, pp. 3-4. Appellant attempts to argue in this Court that the "limitation" reverts back to the first moment of the day it was enacted. Its concession in the lower court was more accurate. In the district court, appellant first argued that the effective date was October 10. (Id., f.n. at p. 3) After it learned by virtue of the affidavits referred to at p. 23, n. 20 of its Jurisdictional Statement that judges' salary adjustments go into effect on October 1, it conceded the validity of the argument that for "several hours during October 1" judges were entitled to the adjustments. Now appellant contends the adjustment never went into effect because the enactment of the limitation should be effective from the beginning of the day. It offers *Lapeyre* v. *U.S.*, 84 U.S. (17 Wall) 191 (1872) and *Central Maryland Lines, Inc.* v. *U.S.*, 240 F.Supp. 254 (D.Md. 1965) as authority for the proposition that as a "general rule" an Act of Congress is deemed effective from the first moment of the day on which it is signed regardless of the precise time of its actual approval by the President. This is not the "general rule" at all but a rule "specially" devised for the particularly

different tack, but the fact remains that when federal judges went to work on October 1, 1976, they were earning $44,000 per year. When they went home, under appellant's intepretation of the events of that day, they were downgraded to the prior rate of $42,000.

Appellees, however, have no intention of demeaning their right to full compensation—or the value of judicial service—by predicating their claims on the performance of a few hours service or on appellant's mystical vesting hour. This issue, we submit, was resolved 177 years ago in the very first reported case to consider the Compensation Clause, *United States* v. *More,* 3 Cranch 160 (Cir. Ct. D.C. 1803). At issue in that case was an act of Congress abolishing fees charged by justices of the peace. Judge More claimed that the law could not be invoked as to justices who took office at a time when such fees were lawful. The fees were payable when the

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[23] (Continued)

peculiar factual situation found in *Lapeyre.* It would appear that the "general" rule is set forth in *Louisville* v. *Savings Bank,* 104 U.S. 469 (1881), *Taylor* v. *Brown,* 147 U.S. 640 (1892), and *Burgess* v. *Salmon,* 97 U.S. 381 (1878).

In *Louisville* the Court held that the *Lapeyre* (first moment) rule applies "when the evidence does not show the necessity of regarding fractions of a day." (104 U.S. at 476.)

The *Louisville* Court then promulgated what is properly the general rule governing this question, that "[Courts] may, when substantial justice requires it, ascertain the precise hour when a statute took effect by approval of the executive. . . . We look to the final act of approval by the executive to find when the statute took effect, and when necessary, inquire as to the hour of the day when that approval was, in fact, given," 104 U.S. at 478-79.

services were rendered. Thus, the amount of fees any justice would receive in any year was unknown, or in appellant's terms, was "only an expectancy," was "not yet earned" and had not "vested." (J.S. at 24.) Nevertheless, the Court held that as to sitting justices, the abolition of these fees was a diminution of compensation in violation of Article III, Section 1.[24]

Furthermore, appellant misunderstands the purpose of the 1975 Executive Salary Cost-of-Living Adjustment Act. The annual adjustment received each year in October is to compensate for the loss already sustained as a result of the increase in cost-of-living *in the previous year.* Hence, the 4.8% salary adjustment in 1976 and the 7.2% in 1977 were to bring pay levels back to their effective levels.

The court below correctly recognized that Article III, Section 1 obliges Congress to declare what the compensation of a federal judge shall be and further recognizes that Congress may do so by defining the salary component of a judge's compensation in terms of a specific formula. This is common, if not prevalent, in employment contracts, statutes and other provisions covering most of the American work force, executive and non-executive, including

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[24] As to appellant's assertion that the salary increases had not yet been "earned," by federal judges prior to October 1 of each year, *Booth* v. *United States,* 291 U.S. 339 (1934) is instructive. The Solicitor General there argued that the salaries of retired federal judges could be diminished since "no duties are obligatory on one who has retired." 291 U.S. at 351. This Court unanimously rejected the argument that the right to compensation was linked to the requirement to perform particular duties.

state and local government officers and employees. Hence, while the salary adjustment might not be paid out until October 1 of each year—a point upon which appellant so heavily relies—the entitlement to that adjustment "vested" with the enactment of the 1975 Executive Cost-of-Living Adjustment Act. The report annually submitted by the President to Congress establishes only the actual percentage amount of the cost-of-living adjustment for federal employees, based on the previous year's increase in the cost-of-living, not the right to the adjustment.

The Supreme Court of Delaware recently addressed this question in interpreting its own constitutional prohibition against the diminution of judicial salaries. Citing this Court's decision in *Booth* v. *United States,* 291 U.S. 339 (1934), the Delaware Court observed the constitutional provision must logically "apply as well to a threat of removing the salary adjustment as the salary itself. . . ." *Stiftel* v. *Malarkey,* 384 A.2d 9, 15, 16 (Del. Sup. Ct. 1977). In that case the Court considered the same arguments appellant advances here and answered:

> It is argued that a formula supplement like the one in this case is a "future" promise which can be revoked with impunity, whereas a stated salary increase would be legally different. We fail to see the basis for such a distinction.

The Court viewed the cost-of-living adjustments *as a part of the judges' compensation* which may not be revoked.

Appellees respectfully submit that the right to a cost-of-living adjustment is clearly a component of a judge's compensation. Indeed, appellant's contention in this regard is contrary to its own position, the position of

Congress, and the understanding of the President and the Office of Personnel Management in analyzing the subsequent adjustment effective October 1, 1978, as discussed at p. 16, *supra*. There it is conceded that the adjustment became payable after the appropriations restriction for that year expired on September 30, 1979. If appellant was correct—and consistent—the "nonvesting" of the fiscal 1979 adjustment by virtue of the restriction in the Appropriations Act would have *eliminated* that adjustment, not postponed it. Yet, in 1979, Congress acknowledged that, judges 'under existing law are *entitled* to approximately 12.9 percent increase in pay." Pub.L. 96-86, (Appendix A, p. 2a) (Emphasis added). As previously indicated, the 12.9% adjustment represents the aggregate of the fiscal 1979 adjustment, payment of which was postponed by the appropriations restriction, and the fiscal 1980 adjustment which became effective October 1, 1979. By its candid recognition of a judge's entitlement to the October, 1978 cost-of-living adjustment, Congress has clearly declared what it believes a judge's compensation to be.[52]

The law as to what constitutes diminution is not in dispute. No court has ever narrowed the protection

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[52] Appellant expresses its fear that the district court's holding—that future increases under the Adjustment Act are part of a judge's compensation protected by the Compensation Clause—would severely limit Congress' constitutional prerogative in setting judicial salaries. It then argues that under the decision below Congress "would forever be precluded from modifying the law in any manner that would afford sitting Article III judges a lesser salary than they would receive pursuant to the Adjustment Act," and that the Adjustment Act scheme may be permanently frozen into law.

of Article III, Section 1 to the barest meaning of cash-in-hand. The definition of a judge's compensation is, as a first matter, the concern of Congress, and Congress has defined that compensation as "a salary at an annual rate determined under Section 225 of the [Salary Act], as *adjusted by* [the Adjustment Act]" (Emphasis added). Congress left no doubt in its yearly enactments that the cost-of-living adjustment was always considered part of a judge's vested compensation, whether Congress would fund it or not. To hold otherwise would allow a massive flaw in the protective function of Article III, Section 1. The opinion of the district court should be affirmed as clearly correct on this point.

III. To Violate The Compensation Clause, The Diminution Need Not Be Discriminatory.

Appellant's final contention is that, assuming this Court agrees that the compensation of judges has been diminished, this Court must nevertheless reverse the judgment below on the ground urged by appellant that a diminution in compensation of a federal judge is not unconstitutional unless it is part of a discriminatory scheme designed to encroach upon the independence of the judiciary. The

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[25] (Continued)

Certainly the Compensation Clause—by its simple terms—limits the power of Congress. This is its virtue, not its vice. We respectfully submit, however, that the only limitation it imposes is the very reasonable one, that once a system is selected—in this case linking judges' cost-of-living adjustments to those paid to the General Schedule employees—the system may not be altered in a manner that would deprive a judge of any compensation that system provides. This is the simple command of the Compensation Clause.

opinion of the district court soundly rejected that proposition. (J.S. at 16a-19a.) It has never been held by any court that proof of a discriminatory animus is necessary to render a direct diminution of a federal judge's compensation unconstitutional.[26] The rule has always been, and *no* case stands to the contrary, that congressional action which reduces or withholds from a judge that to which he is entitled as compensation is, without more, unconstitutional. This Court so held in *Booth* v. *United States,* 291 U.S. 339 (1934).

The setting of *Booth* was a time of national economic peril much more serious than the current circumstances. During the Great Depression, the federal government considered it necessary to reduce the wages of its employees. This reduction was, at first, not applied to Article III judges. Congress itself recognized that such a reduction would violate Article III, Section 1. Accordingly, the Legislative Branch Appropriations Act of 1933, 47 Stat. 382, 402, section 197(5) provided:

> the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum.

---

[26] Only where the compensation of federal judges has been affected *indirectly* by circumstances constituting or involving a general burden of citizenship, has this Court or any court suggested such a prerequisite to a claim of unconstitutionality. See *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939) (general income tax); *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978) (inflation).

This section accompanied other provisions in the same statute cutting the salaries of other federal employees, including Members of Congress, employees of the District of Columbia, mail carriers, etc. *See, e.g.,* Pub. L. No. 72-212, 47 Stat. 382, 401 (June 30, 1932), section 105.

The next year, more expenditure reductions were economically necessary. In the "Act to Maintain the Credit of the United States Government," Pub. L. No. 73-2, 48 Stat. 8 (March 20, 1933), pensions were reduced, and three months later, in an Act entitled "Fourth Deficiency Act, fiscal year 1933," Pub. L. No. 73-78, 48 Stat. 283 (June 16, 1933), the salaries of additional federal employees were reduced. Section 13 of that later act, 48 Stat. 283, 307, cut the retirement pay of federal judges by 15%. In the same statute, a host of other federal employees' salaries were reduced as well, in similar amounts. There was no discrimination.

Judge Booth, a retired federal judge whose salary had been reduced, brought suit against the United States. The Solicitor General argued that a *retired* judge was not entitled to the protection of his compensation under Article III, Section 1. This Court ruled that retired judges were still entitled to the guarantee of Article III, Section 1. The Court then considered the question of whether the diminution was unconstitutional. *The Solicitor General had conceded that if a retired judge was an Article III Judge, the diminution would be unconstitutional. This Court agreed*:

> In other words, is a diminution after an increase banned, if the compensation notwithstanding the reduction is in excess of that payable when the incum-

> bent took office? *The answer must be in the affirmative.* Several courts, in well-considered decisions, have so interpreted analogous provisions of state constitutions . . . the Solicitor General with commendable candor admits that *a contrary construction would be subversive of the purpose of §1 of Article III.*

291 U.S. at 352. (Emphasis added)

If the prohibition against diminution were meant to contain the additional proviso hypothesized by the appellant, proscribing diminution of a judge's compensation only when accomplished as a result of discrimination, the Solicitor General would not have conceded otherwise in *Booth* and this Court certainly would not have ruled the challenged statute unconstitutional. The reduction in compensation at issue in that case was in the context of a *general cut in salaries for all federal employees, in the face of severe economic conditions.* The Court would, at least, have been forced to *inquire* into whether the 15% reduction in pay for retired judges was a discrimination calculated to interfere with their independence. No such question was even asked. Had it been, the response would clearly have been negative.[27]

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[27] Nothing in *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939), on which appellant's entire claim on this point rests, implies a contrary rule for *direct* diminution cases. *O'Malley* v. *Woodrough* involved an *indirect* diminution in compensation, one brought about by the impact of a general tax imposed on all citizens.

"The *Woodrough* opinion," Appellant reminds us, "echoed Justice Holmes' dissent in *Evans* v. *Gore* . . . ." (J.S. at 28, n. 24). In light of that observation, it is critical to recall Mr. Justice Holmes' words in *Evans* v. *Gore,* 253 U.S. 245, 265 (1920), that the Constitution's concern with undue dependence by the judiciary, "is a

This principle has been obvious to the Congress as well. As noted above, the Legislative Branch Appropriations Act of 1933, 47 Stat. 382, 402, which lowered federal employees' salaries during the Depression, contained the proviso, "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." 47 Stat. 382, 402, Section 197(5).

And in the precise statutory context of this case, the Adjustment Act (which requires that federal judges' salaries be adjusted in the same manner as the salaries of General Schedule employees), specifically exempts federal judges from comparability with the General Schedule on those occasions when such adjustments are downward. Section 461(b) of Title 28, United States Code, states that the Act "shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III . . . be diminished during such individual's continuance in office."

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[27] (Continued)
very good reason for preventing attempts to deal with a judge's *salary as such,*" but was not appropriate for consideration of the "ordinary duties of a citizen." (Emphasis added) The distinction between direct attempts to deal with a judge's salary "as such" and the general obligations of citizenship, is clearly drawn. It had been foreshadowed in the *Evans* dissent, promulgated in *Woodrough,* and has recently been relied upon by the Court of Claims in *Atkins* v. *United States,* 556 F.2d 1028, 1045 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978) (applying the *O'Malley* v. *Woodrough* rule because inflation affected the public generally, though "indirectly bringing about the lowering of judges' 'take-home pay.' "). *Direct* diminutions are—and always have been—forbidden.

Congress would not have enacted the statutory provisions which excluded the reduction of judges' salaries from a general reduction in the pay of all other federal employees, had it shared the views expressed here by appellant. (Nor would the Solicitor General have conceded the point in *Booth,* were it not for his recognition that "a contrary construction would be subversive of the purpose of §1 of Article III," 291 U.S. 352.)

In sum, both Congress and this Court have consistently held that a direct diminution in the compensation of a federal judge is prohibited, regardless of whether other federal employees' compensation is likewise reduced.[28] The only exception to this absolute prohibition against diminution has been in the case of an indirect diminution, imposed upon judges by the effect of a common

---

[28] The records of the Constitutional Convention support this principle in another respect, as well. The debates and documents of the Convention reflect a concern for the independence of the federal judiciary in the context of insuring against "undue complaisance" by the courts in favor of the legislature when members of the legislative had cases in Court. 2 M. Farrand, *The Records of the Constitutional Convention* 1787, at 44-45 (remarks of J. Madison). It was Madison's view that the temptation to a judge could only be insured against by proscribing both increases and decreases during the judge's term of office. The Convention, however, insisted that a judge serving a life tenure would require upward adjustments in his compensation. But the Convention did enact the prohibition against diminution which, Madison had contended, represented the more serious situation for possible "undue complaisance."

This effort to remove, as far as practicable, the circumstances under which judges might be encouraged to exercise undue complaisance toward the legislature is not advanced by considerations of discriminatory motives.

duty of citizenship. The very opinion appellant cites, Mr. Justice Holmes' dissent in *Evans,* itself reaffirmed the absolute prohibition when a federal judge's compensation, "as such," was involved. (See n. 27 supra.)

The third contention of appellant, that the compensation of Article III judges may be diminished if not done discriminatorily, finds no support in judicial or congressional action. The motion to affirm may be granted as to this contention on the direct authority of *Booth* v. *United States,* as well as the entire history of the Compensation Clause.

CONCLUSION

Appellees respectfully submit that the law upon which this cause depends is so clear and the decision of the court below is so obviously correct as to warrant no further argument or review in this Court. Accordingly, appellees respectfully move that this Court affirm the judgment entered in this cause by the district court.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

Section 304(a)(1) of Pub.L. 95-391 (effective September 30, 1978) the 1979 Legislative Branch Appropriations Act, provides:

> SEC. 304. (a) No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is—
>
> (1) fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of title 5, United States Code, or
>
> (2) limited to a maximum rate which is equal to or greater than the rate of basic pay for such level V (or to a percentage of such a maximum rate) by reason of section 5308 of title 5, United States Code, or any other provision of law or congressional resolution.

Section 101(c) of Pub.L. 96-86 [H.J. Res. 412] (adopted October 12, 1979, entitled, Appropriations—Fiscal Year 1980—Continuance, provides in part:

> For the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent in-

crease in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year.

Provided, further, That for the purpose of carrying out this provision and notwithstanding the provisions of the Federal Pay Comparability Act of 1970, the Executive Salary Cost-Of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, and notwithstanding section 102 of this joint resolution, the provisions of section 304 of the Legislative Branch Appropriation Act, 1979, which limit the pay for certain Federal offices and positions, shall apply to funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation the term "at a rate which exceeds by more than 5.5 percent the rate" shall be substituted for the term "at a rate which exceeds the rate" which it appears in subsection (a) of such section for the purpose of limiting pay increases to 5.5 percent.

APPENDIX B

Bulletin No. 492, Supplement No. 24 issued by the Administrative Office of the United States Courts on October 11, 1976 states:

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

Supreme Court Building

Washington, D.C. 20544

October 11, 1976

TO ALL JUDGES AND OTHER OFFICERS AND EMPLOYEES OF THE UNITED STATES COURTS

SUBJECT: FEDERAL PAY COMPARABILITY

Pursuant to the provisions of the Executive Salary Cost of Living Adjustment Act (PL 94-82, 89 Stat. 419) and 5 USC 5301, et seq., the President on October 1, 1976, issued Executive Order 11941 adjusting judicial salaries and the rates of basic pay and salaries of employees subject to the General Schedule effective on the first day of the first pay period beginning on or after October 1, 1976.

The Judicial salaries are as follows:

Circuit Judges	$46,800*
District Judges	$44,000**
Judges of the Court of Claims	$46,800*
Judges of the Court of Customs and Patent Appeals	$46,800*
Judges of the Customs Court	$44,000**
Commissioners of the Court of Claims	$39,600***
Referees in Bankruptcy (full-time)	$39,600***

Pursuant to the Legislative Branch Appropriation Act, 1977, funds are not available to pay a salary or a rate which exceeds the rate in effect on September 30, 1976, as follows:

*$44,600 **$42,000 ***$37,800

The statute permits comparability adjustments in the rates of basic pay of certain officers and employees in or under the Judicial Branch of the Government by amounts not in excess of the amounts of the respective adjustments made by the President in his Executive Order for employees subject to the General Schedule. These increases average 4.83% but vary by grade from a low of 4.24% for grade GS-5 to a high of 11.83% for grade GS-18. The increases for the Judicial Branch, unless otherwise provided for, are effective October 11, 1976.

The salary increases resulting from these upward adjustments in the rates of basic compensation apply generally to the supporting personnel of the Courts of Appeals and District Courts of the United States, the Temporary Emergency Court of Appeals, the U. S. District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court.

Supreme Court, U. S.
FILED
JUN 28 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-983 and 79-1689

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-983

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

No. 79-1689

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court in No. 79-983 (J.S. App. 1a-19a) is reported at 478 F. Supp. 621. The opinion

of the district court in No. 79–1689 (J.S. App. 1a–10a) is not yet reported.

JURISDICTION

The order of the district court granting summary judgment against the United States in No. 79–983 was entered on August 29, 1979. The United States filed a notice of appeal from this order on September 26, 1979 (J.S. App. 22a–23a).[1] On November 19, 1979, Mr. Justice Stevens extended the time for docketing the appeal to and including December 24, 1979. The Jurisdictional Statement was filed on December 21, 1979. On February 19, 1980, the Court postponed further consideration of the question of jurisdiction to the hearing on the merits (J.A. 56a).

The judgment of the district court in No. 79–1689 (J.S. App. 11a–12a) was entered on February 12, 1980. The United States filed a notice of appeal on March 10, 1980 (J.S. App. 13a). The Jurisdictional Statement was filed on April 25, 1980. On June 16, 1980, the Court postponed further consideration of the question of jurisdiction to the hearing on the merits and consolidated the two cases for briefing and oral argument (J.A. 76a).

The jurisdiction of this Court in both cases rests upon 28 U.S.C. 1252. *United States* v. *Clark*, No. 78–1513

[1] On September 24, 1979, the clerk of the district court entered judgment (J.S. App. 20a–21a) on the district court's decision. The government was unaware of the entry of this judgment at the time it filed the notice of appeal on September 26, 1979. As a precaution, on October 17, 1979, the United States filed a notice of appeal (J.S. App. 24a–25a) from the September 24 judgment. Because 28 U.S.C. 1252 permits a direct appeal to this Court from an "interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional in any civil action * * * to which the United States * * * is a party," and because 28 U.S.C. 2101(a) requires the notice of appeal in such cases to be filed within 30 days "after the entry of the interlocutory or final order, judgment or decree," it appears that the operative notice of appeal is the one filed on September 26, 1979.

(Feb. 26, 1980), slip op. 3–4 n.2; *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31–32 (1975).

QUESTIONS PRESENTED

1. Whether, as a matter of statutory construction, the 1976 Pay Act (Pub. L. No. 94–440, 90 Stat. 1439, 1446, 2 U.S.C. 356a), the 1977 Pay Act (Pub. L. No. 95–66, 91 Stat. 270), the 1978 Pay Act (Pub. L. No. 95–391, 92 Stat. 763, 788–789), and the 1979 Pay Act (Pub. L. No. 96–86, 93 Stat. 656, 657) served to supersede or rescind the cost-of-living increases authorized for Article III judges by the Executive Salary Cost-of-Living Adjustment Act for fiscal years 1977, 1978, 1979, and 1980.

2. Whether, at the time the 1976, 1977, and 1978 Pay Acts were enacted, the cost-of-living increases prescribed in the Adjustment Act constituted "compensation" of Article III judges within the meaning of the Compensation Clause of the Constitution, and thus whether the Pay Acts, in failing to allow the scheduled increases to occur, constituted a diminution of compensation.

3. Whether the 1976, 1977, and 1978 Pay Acts, which eliminated future salary increases scheduled for Article III judges under the Adjustment Act, and the 1979 Pay Act, which prospectively reduced the amount of a salary increase then in effect for Article III judges, violated the Compensation Clause, where the Acts did not represent a discriminatory attack on Article III judges and were not enacted with the purpose or effect of undermining the independence of Article III judges.[2]

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[2] In addition to the questions presented in the Jurisdictional Statements, the Court has directed the parties "to address the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court" (J.A. 56a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause of the Constitution, the pertinent portions of the applicable salary statutes, and 28 U.S.C. 2109 are set forth in the appendices to the Jurisdictional Statements (79-983 J.S. App. 26a-33a; 79-1689 J.S. App. 14a-26a). 28 U.S.C. 455 is set forth in the Appendix, *infra*, 1a-3a.

STATEMENT

These cases are class actions brought under Fed. R. Civ. P. 23(b)(2) on behalf of Article III judges. In No. 79-983 (*Will I*), the district court held that the 1976 Pay Act (Pub. L. No. 94-440, 90 Stat. 1439, 1446, 2 U.S.C. 356a) and the 1977 Pay Act (Pub. L. No. 95-66, 91 Stat. 270) violated the Compensation Clause of the Constitution (Article III, Section 1; 79-983 J.S. App. 26a) by failing to increase the salary of Article III judges for fiscal years 1977 and 1978 in accordance with the Executive Salary Cost-of-Living Adjustment Act ("Adjustment Act") (79-1689 J.S. App. 14a-17a). The court held in addition that, as a matter of statutory construction, the Pay Acts did not modify or repeal the judges' substantive entitlement to the annual cost-of-living increases authorized by the Adjustment Act. In No. 79-1689 (*Will II*), the same district judge, relying on his decision in *Will I*, reached the same constitutional and statutory conclusions in regard to the 1978 Pay Act (Pub. L. No. 95-391, 92 Stat. 763, 788-789) and the 1979 Pay Act (Pub. L. No. 96-86, 93 Stat. 656, 657).

1. The federal pay system consists of a complex array of statutory and regulatory provisions. Insofar as pertinent here, this system may be summarized as follows.

The salaries of federal judges, as well as those of the Vice President, Cabinet officers and other heads of agencies, members of Congress, and additional designated officials of the executive, legislative, and judicial branches, are determined pursuant to the Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90–206, Title II, Section 225(a)–(k), 81 Stat. 642–645, 2 U.S.C. 351–361 ("Federal Salary Act"). See 2 U.S.C. 356.[3] Under this Act, the salaries of these officials are reviewed every four years (commencing in fiscal year 1969) by the Commission on Executive, Legislative, and Judicial Salaries appointed in accordance with the terms of the statute. See 2 U.S.C. 352, 356. This "review by the Commission shall be made for the purpose of determining and providing (i) the appropriate pay levels and relationships between and among the respective offices and positions covered by such review, and (ii) the appropriate pay relationships between such offices and positions and the offices and positions subject to [classification and General Schedule (GS) pay rates under 5 U.S.C. 5101 *et seq.*, 5331 *et seq.*]." 2 U.S.C. 356. The Commission then reports to the President the results of its review and its salary recommendations. 2 U.S.C. 357. Thereafter, in the next budget transmitted to Congress, the President recommends the exact rates of pay that he deems advisable for each of these offices and positions. 2 U.S.C. 358. The President's recommendations become final and effective, at the time provided in the Act, following approval by both Houses of Congress. 2 U.S.C. (Supp. I) 359. See *Pressler* v. *Simon*, 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), vacated and remanded, 431 U.S. 169 (1977), order reinstated, Civ. No. 76–782

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[3]The salary of the Vice President was brought within the Act in 1975. Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94–82, Section 206, 89 Stat. 423. See S. Rep. No. 94–333, 94th Cong., 1st Sess. 9 (1975).

(D.D.C. July 19, 1977) (three-judge court), aff'd, 434 U.S. 1028 (1978).

The Federal Salary Act contains no provision for annual adjustments to the salaries of officials covered by the Act, including federal judges. Rather, the sole means specified in that Act for modifying such salaries is the quadrennial review process. In 1975, however, Congress enacted the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94–82, 89 Stat. 419. This Act is generally applicable to the offices covered by the Federal Salary Act, including those of the Vice President (3 U.S.C. 104), Cabinet officers and other Executive Schedule officials (5 U.S.C. 5318), members of Congress (2 U.S.C. 31), and federal judges (28 U.S.C. 461).[4] Under the Adjustment Act, such salaries are subject to an annual adjustment equal to the average percentage cost-of-living adjustment made in the General Schedule (GS) pay rates pursuant to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301, 5305–5308 ("Comparability Act").[5]

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[4] 28 U.S.C. 461 extends to federal judges by virtue of 28 U.S.C. 5 (Supreme Court Justices), 44(d) (Court of Appeals judges), 135 (District Court judges), 173 (Court of Claims judges), 213 (Court of Customs and Patent Appeals judges), and 252 (Customs Court judges). See also 28 U.S.C. 792 (Court of Claims commissioners); 11 U.S.C. 68 (bankruptcy referees). In addition, various non-Article III judges included in the Federal Salary Act are indirectly covered by the Adjustment Act because their salaries are expressly set at the level of district court or court of appeals judges. See 10 U.S.C. 867(a)(1) (Court of Military Appeals judges); 26 U.S.C. 7443(c) (Tax Court judges). See also 28 U.S.C. (and Supp. II) 603 (Director and Deputy Director of the Administrative Office of the United States Courts). Finally, certain categories not covered by the Federal Salary Act, such as District of Columbia judges and some Civil Service employees, are also indirectly affected by the Adjustment Act. See D.C. Code §§ 11–703(b), 11–901 (1973), discussed in *Swain* v. *Pressley*, 430 U.S. 372, 383 n.18 (1977) (District of Columbia judges); note 7, *infra* (Civil Service employees).

[5] Under the Comparability Act, and hence also under the Adjustment Act, cost-of-living adjustments can result in salary decreases as well as

Annual cost-of-living adjustments under the Comparability Act are governed by 5 U.S.C. 5305 (79–983 J.S. App. 27a–31a). The initial step in this process is for the President to designate an appropriate agent to compare the GS rates "with the rates of pay for the same levels of work in private enterprise as determined * * * by the Bureau of Labor Statistics * * *." 5 U.S.C. 5305(a)(1)(A). Following this study, the agent submits to the President a report that makes the above comparison between GS and private salaries and recommends appropriate adjustments in the GS rates of pay. 5 U.S.C. 5305(a)(1).

After considering this report and also the findings and recommendations of the Advisory Committee on Federal Pay (5 U.S.C. 5305(a)(2), 5306), the President may adjust the GS rates in accordance with the principles of comparability contained in 5 U.S.C. 5301(a), in which event he must transmit to Congress a report of the pay adjustment including a determination of the overall percentage adjustment in the General Schedule. 5 U.S.C. 5305(a)(2), (3). However, if, "because of national emergency or economic conditions affecting the general welfare," the President considers it inappropriate to make such an adjustment, he must transmit to Congress an alternative plan setting forth an appropriate adjustment and specifying the overall percentage increase (or decrease) in the GS rates of pay. 5 U.S.C. 5305(c)(1). The President's alternative plan becomes effective "on the first day of the first applicable pay period commencing on or after October 1 of the applicable year," and thereafter remains in effect, unless, within 30

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increases, depending upon economic conditions. However, Congress provided in the Adjustment Act that a salary adjustment not be made "to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office." 28 U.S.C. 461(b) (79–983 J.S. App. 27a).

legislative days as defined in the statute, either House of Congress adopts a resolution disapproving the alternative plan. 5 U.S.C. 5305(c)(2). In that event, the President must again consider the report of his agent and adjust the rates of pay in accordance with the principles of comparability. 5 U.S.C. 5305(c)(2), (m). See *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

In addition to establishing the methodology for determining the amount of an annual cost-of-living adjustment, the Adjustment Act also specifies the effective date of any such adjustment. In particular, the Act provides that a salary adjustment for Article III judges becomes "[e]ffective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under [the Comparability Act] in the rates of pay under the General Schedule * * *" (28 U.S.C. 461(a); 79–983 J.S. App. 26a). Since Article III judges are paid on a monthly basis,[6] their cost-of-living adjustment becomes effective as of the first day of the month in which a GS adjustment takes effect pursuant to the Comparability Act.

2. a. In October 1975, GS salaries were increased by an overall average of 5% pursuant to the Comparability Act, and federal judges and others covered by the Adjustment Act received a like increase. Exec. Order No. 11883, 3 C.F.R. 1024 (1971–1975 Compilation); 11 Weekly Comp. of Pres. Doc. 910 (Aug. 29, 1975). This adjustment raised the annual salary of district judges to $42,000 and of court of appeals judges to $44,600.

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[6] See 5 U.S.C. 5505 and 28 U.S.C. 5, 44(d), 135, 173, 213, and 252; compare 5 U.S.C. 5504, 5541(2)(i). See also affidavit of Joseph A. Leach, filed as an attachment to the Memorandum in Support of Plaintiffs' Motion for Summary Judgment (J.A. 38a).

In October 1976, GS salaries were increased under the Comparability Act by an overall average of 4.8% as recommended by the President's agent for federal pay. Exec. Order No. 11941, 3 C.F.R. 151 (1976 Compilation); 12 Weekly Comp. of Pres. Doc. 1435 (Oct. 1, 1976). On October 1, 1976, however, the President signed the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, 1446, 2 U.S.C. 356a (79-983 J.S. App. 31a) ("1976 Pay Act"). The 1976 Pay Act provided that "none of the funds * * * appropriated in this Act or any other Act shall be used to pay the salary [of an individual covered by the Federal Salary Act] * * * at a rate which exceeds the salary rate in effect on September 30, 1976 [except increases pursuant to the four-year review of the Federal Salary Act] * * *" (*ibid.*). Because of this provision, cost-of-living increases that otherwise would have taken effect under the Adjustment Act did not occur for officials within the Federal Salary Act, including the Vice President, Cabinet officers and other Executive Schedule personnel, members of Congress, and federal judges.

b. Less than four months later, in January 1977, the President recommended substantial salary increases for these officials pursuant to the quadrennial review required by the Federal Salary Act. For example, salaries for district judges were increased by 29.8% to $54,500, and salaries for court of appeals judges were increased by 28.9% to $57,500. These increases became effective in March 1977. 42 Fed. Reg. 10297 (1977).

In order "to deal with the anomalous situation of Members of Congress, high level Federal executives, and Federal judges receiving two pay raises in the same calendar year" (H.R. Rep. No. 95-458, 95th Cong., 1st Sess. 2 (1977)), the Federal Comparability Pay Adjustments Act of 1977, Pub. L. No. 95-66, 91 Stat. 270 (79-983 J.S. App.

32a) ("1977 Pay Act"), was enacted on July 11, 1977. The 1977 Pay Act provided that the cost-of-living increases that otherwise would have become effective in October 1977 under the Adjustment Act "shall not take effect" for the Vice President, members of Congress, Cabinet officers and Executive Schedule officials, and federal judges, commissioners and referees. As the House Report explained (H.R. Rep. No. 95–458, *supra*, at 1, 2):

> The sole purpose of [the 1977 Pay Act] is to eliminate the expected October 1977 comparability adjustment for certain individuals in the executive, legislative, and judicial branches whose rates of pay were increased earlier this year pursuant to the recommendations of the Quadrennial Commission.
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> The purpose of the comparability pay system is to insure that pay rates in the Federal service will remain comparable to those in the private sector. Thus, in essence, that system serves much the same purpose as do the recommendations of the Quadrennial Commission. Since those recommendations have now been implemented and the goals of comparability have been achieved, this committee believes it would be inappropriate for persons covered by the Quadrennial Commission's recommendations to receive a comparability increase this October.

In October 1977, GS salaries, which generally had not been affected by the March 1977 increase pursuant to the quadrennial review,[7] were raised by an overall average of

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[7] GS salaries are not subject to the Federal Salary Act. However, under 5 U.S.C. 5308, the lowest level in the Executive Schedule sets a ceiling that cannot be exceeded by any GS salary. See *McCorkle* v. *United States*, 559 F.2d 1258, 1259 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978). The March 1977 increase under the Federal Salary Act served to raise this ceiling from $39,600 to $47,500, and thus those GS employees who had reached the previous ceiling benefitted from this increase.

7.1% under the Comparability Act in accordance with the recommendation of the President's agent for federal pay. Exec. Order No. 12010, 3 C.F.R. 142 (1977 Compilation); 13 Weekly Comp. of Pres. Doc. 1436 (Sept. 29, 1977).

c. In October 1978, as recommended in the report of the President's pay agent, GS salaries were increased under the Comparability Act by an overall average of 5.5%. Exec. Order No. 12087, 3 C.F.R. 234 (1978 Compilation); 14 Weekly Comp. of Pres. Doc. 1732 (Oct. 10, 1978). On September 30, 1978, Congress enacted the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 763, 788-789 (79-1689 J.S. App. 21a-23a) ("1978 Pay Act"). The 1978 Pay Act provided that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 [fiscal year 1979], by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978 * * * [if the rate of salary exceeds a specified level]" (*id.* at 22a). Because of this provision, cost-of-living increases of 5.5% that otherwise would have taken effect in October 1978 under the Adjustment Act did not occur for a broad range of ranking government officials, including the Vice President, Cabinet officers and other Executive Schedule personnel, members of Congress, and federal judges.

d. For fiscal year 1980, the President's pay agent recommended an average GS cost-of-living adjustment of 10.41% under the Comparability Act. See 15 Weekly Comp. of Pres. Doc. 1530 (Aug. 31, 1979). However, in light of "[i]nflation [which] continues to be the single greatest threat to our economy and * * * a national prob-

lem of foremost concern," the President on August 31, 1979, submitted an alternative plan calling generally for a 7% increase (*ibid.*). The President's alternative plan became effective in October 1979 when neither House of Congress disapproved it within 30 legislative days. See 5 U.S.C. 5305(c)(2) (79–1689 J.S. App. 21a).

Accordingly, on October 1, 1979 (the beginning of the first applicable pay period commencing on or after the first day of the month in which the GS increase for fiscal year 1980 took effect), two adjustments occurred in the salaries of, among others, federal judges. First, the 7% cost-of-living adjustment for fiscal year 1980 based on the President's alternative plan became effective. Second, since the 1978 Pay Act expired by its own terms on September 30, 1979, the 5.5% increase that the Act had superseded during fiscal year 1979 automatically went into effect. Together, these two adjustments resulted in a compounded salary increase of approximately 12.9%.[8]

On October 12, 1979, however, the 1979 Pay Act (Pub. L. No. 96–86, 93 Stat. 656; 79–1689 J.S. App. 23a–26a) was signed into law. The 1979 Pay Act provides that "[f]or the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay * * * " (*id.* at 24a). The Act further provides (*ibid.*):

> That for the purpose of carrying out this provision and notwithstanding the provisions of the Federal

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[8]The final pay schedules for fiscal year 1980 are set forth in Exec. Order No. 12200, 45 Fed. Reg. 16443 (1980), 16 Weekly Comp. of Pres. Doc. 467 (Mar. 12, 1980), superseding Exec. Order No. 12165, 44 Fed. Reg. 58671 (1979), 15 Weekly Comp. of Pres. Doc. 1848 (Oct. 10, 1979).

> Pay Comparability Act of 1970, the Executive Salary Cost-Of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, * * * the provisions of [the 1978 Pay Act], which limit the pay for certain Federal offices and positions, shall apply to funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation the term "at a rate which exceeds by more than 5.5 percent the rate" shall be substituted for the term "at a rate which exceeds the rate" where it appears in subsection (a) of such section for the purpose of limiting pay increases to 5.5 percent.

Because of the 1979 Pay Act, the fiscal year 1980 salary increases of all individuals subject to the 1978 Pay Act, including the Vice President, Cabinet officers and Executive Schedule personnel, members of Congress, and federal judges, were reduced to 5.5% as of October 12, 1979.

3. a. On February 7, 1978, appellees commenced the *Will I* litigation in the United States District Court for the Northern District of Illinois to challenge the 1976 and 1977 Pay Acts.[9] As elaborated in the memorandum in support of their motion for summary judgment, appellees contended in Count I of the amended complaint that the 1976 Pay Act was merely an appropriations measure that refused to provide funds for the 1976 cost-of-living increase but did not modify their substantive entitlement to the increase under the Adjustment Act (79–983 J.S. App. 4a; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 25–32). Alternatively, appellees argued that the 1976 Pay Act was unconstitutional under the

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[9]The jurisdiction of the district court was invoked under the Tucker Act, 28 U.S.C. 1346(a)(2) (79–983 J.S. App. 2a).

Compensation Clause insofar as it denied them the 1976 cost-of-living increase (79–983 J.S. App. 4a; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 25, 32). In Count II of the amended complaint, appellees asserted that the 1977 Pay Act violated the Compensation Clause by superseding the cost-of-living adjustment scheduled to take effect in October 1977 (79–983 J.S. App. 5a; Memorandum in Support of Plaintiffs Motion for Summary Judgment, at 33–35). Appellees sought a declaration that the failure to pay them the 1976 and 1977 cost-of-living adjustments was unlawful and an injunction requiring the United States to pay them these salary increases (79–983 J.S. App. 1a, 20a–21a).

By order dated March 20, 1979, the district court granted appellees' motion for class certification under Fed. R. Civ. P. 23(b)(2) (J.A. 53a–55a). The Count I class, relating to the 1976 Pay Act, was defined to be all persons who served as Article III judges during part or all of the period between October 1, 1976, when the 1976 cost-of-living adjustment was scheduled to take effect, and March 1, 1977, when a salary increase occurred pursuant to the Federal Salary Act (J.A. 54a–55a). The Count II class, relating to the 1977 Pay Act, consisted of all persons who were appointed Article III judges prior to July 11, 1977 (the date of enactment of the 1977 Pay Act) and held office subsequent to October 1, 1977 (the date on which, but for the 1977 Pay Act, the 1977 cost-of-living adjustment would have become effective for federal judges) (J.A. 55a). The district court's order expressly noted that no judge appointed after July 11, 1977, was a member of either class (*ibid.*).[10]

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[10] The district judge in this case had been appointed to the bench on October 11, 1977, and thus was not a member of either class.

On August 29, 1979, the district court granted appellees' motion for summary judgment (79–983 J.S. App. 1a–19a). The court held that the failure to increase the salaries of federal judges in 1976 and 1977 in accordance with the Adjustment Act constituted a diminution of the judges' compensation and thus violated the Compensation Clause. In reaching this result, the court agreed with appellees that (*id.* at 7a–8a, 14a–15a)

> once the * * * [Adjustment Act,] granting judges "a salary at an annual rate determined under * * * [the Federal Salary Act] as adjusted by Section 461 of this Title," * * * became law [in 1975], the right to an annual adjustment, measured by the average adjustment in the General Schedule, became a part of the judges' [*sic*] compensation which may not be "diminished."
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> * * * * *
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> The Compensation Clause[ ] * * * [requires] that once the method [for determining judicial compensation] is selected it not be altered to diminish the compensation to which judges are entitled.

Finding that the failure to pay the 1976 and 1977 cost-of-living adjustments represented a direct reduction of the judges' compensation, the court concluded that the 1976 and 1977 Pay Acts were unconstitutional even though they "[did] not discriminate against judges * * * [or] make inroads on their independence" (*id.* at 16a). In addition, as a matter of statutory construction, the court held that neither the 1976 Pay Act nor the 1977 Pay Act modified or repealed the substantive provisions of the Adjustment Act authorizing an annual cost-of-living increase for judges (*id.* at 18a). The court thus entered judgment for appellees for the unspecified amounts of unpaid compensation on both counts of their complaint (*id.* at 20a–21a).

b. On October 19, 1979, appellees commenced the *Will II* litigation in the United States District Court for the Northern District of Illinois. Appellees contended that the 1978 and 1979 Pay Acts were unconstitutional under the Compensation Clause because they deprived Article III judges of the cost-of-living increases authorized in the Adjustment Act. Appellees also asserted that, as a matter of legislative intent, the Pay Acts were only appropriations measures that refused to provide funds for the cost-of-living increases but did not alter the substantive entitlement to the increases pursuant to the Adjustment Act. Finally, appellees argued that the 1979 Pay Act on its face covered only "executive employees, which includes Members of Congress" (79–1689 J.S. App. 24a) and therefore was simply inapplicable to federal judges.

By order dated January 31, 1980, the district court, after certifying two plaintiff-classes, granted appellees' motion for summary judgment (79–1689 J.S. App. 1a–10a).[11] The court held that the 1978 and 1979 Pay Acts violated the Compensation Clause "for the same reasons that identical actions by Congress in 1977 were held unconstitutional" in *Will I* (79–1689 J.S. App. 5a). Based on its view that "subsequent to the 1975 * * * [enactment of the Adjustment Act] the judge's [*sic*] compensation became an annual salary as adjusted by the cost-of-living increase percentage" (*id.* at 6a), the court concluded that

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[11] The two certified plaintiff-classes consisted of all persons who served as Article III judges prior to October 1, 1978, and continued to hold office after that date (the Count I class, concerning the 1978 Pay Act), and all persons who served as Article III judges prior to October 1, 1979, and continued to hold office subsequent to October 12, 1979 (the Count II class, concerning the 1979 Pay Act) (79–1689 J.S. App. 4a). Since the district judge had been appointed to the bench on October 11, 1977 (see note 10, *supra*), he was, in contrast to the situation in *Will I*, a member of both *Will II* classes.

the 1978 and 1979 Pay Acts were invalid under the Compensation Clause as "directly diminishing the compensation provided for by statute for federal judges" (*id.* at 8a). The court also found that the 1978 and 1979 Pay Acts, in failing to appropriate funds for cost-of-living increases, were not intended by Congress to "repeal, suspend, or postpone the operation of the * * * Adjustment Act as it applies to federal judges. * * * [T]he failure to appropriate funds does not defeat a governmental obligation created by statute" (*id.* at 8a, 10a). Finally, with regard to an issue that had not been presented in *Will I*, the court noted that it was "inclined to agree with [appellees'] contention" that the 1979 Pay Act is inapplicable to federal judges because "they are neither 'executive' employees nor 'members of Congress,'" but the court did not consider the question further because of its determination that the Act would be unconstitutional if it did apply to Article III judges (*id.* at 9a). The court thus entered judgment for appellees in the full amount of the unpaid cost-of-living increases due them without regard to the 1978 and 1979 Pay Acts (*id.* at 11a–12a).

SUMMARY OF ARGUMENT

I.

The Court has jurisdiction over these appeals pursuant to 28 U.S.C. 1252. The district court has held unconstitutional several Acts of Congress in civil actions to which the United States is a party. Accordingly, the jurisdictional requirements for an appeal under 28 U.S.C. 1252 are satisfied in these cases.

With respect to the question of disqualification, each of the Justices of this Court is a member of the plaintiff

classes certified pursuant to Fed. R. Civ. P. 23(b)(2) in *Will I* and *Will II*. Similarly, the district judge is a member of the classes in *Will II*. Accordingly, the Justices and the district judge are subject to disqualification under 28 U.S.C. 455(b)(4) and (5)(i), which are applicable to any judge who has "a financial interest in the subject matter in controversy * * * or any other interest that could be substantially affected by the outcome of the proceeding" or "[i]s a party to the proceeding."

Notwithstanding Section 455, however, the district judge and the Justices of this Court are not required to disqualify themselves. Every currently sitting federal judge, whether or not formally a class member, is affected by the district court's statutory rulings that the 1977, 1978, and 1979 Pay Acts were not intended by Congress to supersede or modify the cost-of-living adjustments for Article III judges. Thus, they have a sufficient interest in the outcome of the litigation to be disqualified under 28 U.S.C. 455(b)(4) and (a).

Since all federal judges are therefore covered by Section 455 in these cases, the disqualification issue should be resolved by invoking the "rule of necessity"—that a judge is not disqualified if there is no other judge able to decide the case. This rule ensures that the litigants and the public are not deprived altogether of the judicial processes provided by law. Moreover, there is no indication that the longstanding doctrine of necessity was abrogated by the 1974 revision to Section 455. In light of the settled nature of the rule, the significant public purposes served by the rule, and the constitutional difficulties that the absence of the rule might pose, it should not be presumed that Congress intended by its silence to reject the rule. The courts that have addressed the question are uniformly of the view that Section 455 did not eliminate the rule of necessity.

Accordingly, 28 U.S.C. 455 does not bar the district judge and the Justices of this Court from participating in *Will I* and *Will II*. Furthermore, a decision by this Court is especially appropriate and important in these cases, which present fundamental issues concerning the separation of powers between the Legislative and Judicial Branches and turn on the interpretation of a constitutional provision that the Court has had little occasion to consider. As the forum designated by Congress in 28 U.S.C. 1252, this Court can and should hear the instant appeals.

II.

As a matter of statutory construction, the Pay Acts served to supersede or rescind the annual salary increases authorized for Article III judges by the Adjustment Act. The district court summarily concluded that the Pay Acts were merely funding limitations and were not intended by Congress to modify or repeal the Adjustment Act increases. But "[t]here can be no doubt that Congress could suspend or repeal * * * by an * * * appropriation bill," such as the 1976, 1978, and 1979 Pay Acts, the Adjustment Act's authorization for the cost-of-living increases. *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940). Thus, "[t]he whole question depends on the intention of Congress * * *." *Belknap* v. *United States*, 150 U.S. 588, 594 (1893), quoting *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883).

The language, purpose, and history of the Pay Acts provide ample indication of Congress' intent to enact substantive salary modifications by means of the appropriations measures. The district court therefore erred in attributing to Congress the intent to deny funds for the government's recognized obligations under the Adjustment Act without modifying the basic obligations themselves. Moreover, un-

like the other Acts, the 1977 Pay Act was not an appropriations measure at all, but rather a substantive enactment that unmistakably provided that the October 1977 adjustments "shall not take effect."

In addition, contrary to the views of the district court, the 1979 Pay Act does apply to Article III judges. By its terms, the 1979 Pay Act provides that the 1978 Pay Act, as amended, "shall apply" to fiscal year 1980. Since the 1978 Act expressly extended to the "judicial branch," it is evident that the 1979 Pay Act is also applicable to federal judges. This conclusion is confirmed by the legislative history of the 1979 Act, which explicitly refers to federal judges and is devoid of any suggestion that judges, who had consistently been included in the several preceding Pay Acts, were to be exempted from the 1979 statute.

III.

Assuming the Court finds that Congress intended the Pay Acts to supersede the Adjustment Act increases, these statutes did not violate the Compensation Clause. The 1976, 1977, and 1978 Pay Acts did not diminish the "compensation" of Article III judges because, at the time the statutes were enacted, the annual cost-of-living adjustments had not yet become a part of the judges' salaries.

The district court held that the annual salary adjustments were established as an element of the judges' compensation upon enactment of the Adjustment Act in 1975. But the Adjustment Act itself expressly provides that the annual adjustment for judges takes effect as of the first day of the month in which a GS adjustment goes into effect pursuant to the Comparability Act. Prior to that time, the Adjustment Act increases are not yet effective, and judges, like other officials covered by the Adjustment Act,

have only an expectancy that they will receive the anticipated adjustment, not an entitlement or a vested right to it. Hence, the 1976, 1977, and 1978 Pay Acts, by withholding a *future* increase, did not diminish the judges' compensation.

This result is consistent with the history of the Compensation Clause. The Founding Fathers deliberately empowered Congress to raise, or to refuse to raise, the salaries of federal judges, notwithstanding concerns about the effect of such congressional power on judicial independence. There is no meaningful difference between the authority of Congress, recognized by the Framers of the Constitution, to consider but refuse to enact salary increases for Article III judges and its analogous authority to rescind an increase that has not yet gone into effect.

Finally, the district court's holding—that future increases under the Adjustment Act are part of a judge's compensation protected by the Compensation Clause—would unduly limit the constitutional province of Congress. Under the decisions below, Congress would be forever prevented from modifying the law in any manner that would afford sitting Article III judges a lesser salary than they would receive pursuant to the Adjustment Act. The Adjustment Act and the Compensation Clause cannot sensibly be read to provide a perpetual guarantee that judges will continue to receive not only their present salaries but also the annual cost-of-living adjustment, and thus permanently to freeze into law, as a matter of constitutional doctrine, the Adjustment Act plan that Congress adopted only five years ago.

Accordingly, the Compensation Clause does not preclude Congress from acting to supersede a scheduled adjustment before the cost-of-living increase takes effect. Therefore, the 1976, 1977, and 1978 Pay Acts, in failing to

allow the expected increases to occur, did not constitute a diminishment of compensation within the meaning of the Compensation Clause.

IV.

Even if the Pay Acts resulted in a diminution of judges' salaries, they were within the constitutional power of Congress. The Compensation Clause is not violated by a statute that, like the Pay Acts, does not discriminate against Article III judges or "make[ ] inroads upon the independence of judges" (*O'Malley* v. *Woodrough*, 307 U.S. 277, 282 (1939)). This interpretation comports with the well-established purpose of the Compensation Clause "to promote the public weal by giving [judges] that independence which makes for an impartial and courageous discharge of the judicial function" (*Evans* v. *Gore*, 253 U.S. 245, 248 (1920)). Just as Article III judges "are also citizens * * * [subject to] the common duties of citizenship" (*O'Malley* v. *Woodrough*, *supra*, 307 U.S. at 282), so, too, are they high-ranking public officeholders who should not be exempted from the responsibilities and obligations reasonably imposed on all other leading government officials in the Pay Acts. In light of the object of the Compensation Clause and the decisions of this Court, the Constitution does not preclude Congress from including federal judges in such legitimate, nondiscriminatory legislation.

Nor is this analysis avoided by labeling the Pay Acts as "direct" rather than "indirect" diminutions in compensation. The Compensation Clause should be construed in "view of the scope of protection needed to maintain an independent judiciary" (*Atkins* v. *United States*, 556 F.2d 1028, 1045 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978)), and this remains the guiding principle irrespective of the nature of the alleged diminishment. The district

court, by holding all "direct" diminutions to be unconstitutional without regard to considerations of judicial independence, has divorced the Compensation Clause from its original intendment and has ignored the sound admonition that "a mere exegesis of words is not to be preferred to an interpretation of the Clause in light of its widely acknowledged purpose" (556 F.2d at 1049). Under the Compensation Clause, the same standard, predicated upon the principle of judicial independence, is applicable to "direct" and "indirect" diminutions.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THE PRESENT APPEALS

In its orders of February 19, 1980 (J.A. 56a), and June 16, 1980 (J.A. 76a), the Court postponed the question of jurisdiction in these cases to the hearing on the merits. See also Rule 16(6) of the Rules of this Court. In addition, the Court in *Will I* has directed the parties "to address the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court" (J.A. 56a). We submit that the Court has jurisdiction over these appeals pursuant to 28 U.S.C. 1252 and that, in view of the "rule of necessity," neither the district judge nor the Justices of this Court are disqualified from participating in the disposition of these cases by virtue of 28 U.S.C. 455 (App., *infra*, 1a–3a).

A. The Jurisdictional Requirements For An Appeal Under 28 U.S.C. 1252 Are Satisfied In These Cases

The Court has jurisdiction in these cases under 28 U.S.C. 1252. That statute authorizes any party to appeal to this Court "from an interlocutory or final judgment, de-

cree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States * * * is a party."

These requirements plainly are satisfied here. The final judgments of the district court, in invalidating the Pay Acts, held unconstitutional several Acts of Congress (79–983 J.S. App. 7a, 16a, 20a–21a; 79–1689 J.S. App. 5a, 7a, 11a–12a). The judgments were rendered in civil actions to which the United States is clearly a party. Hence, this Court has jurisdiction over these appeals pursuant to Section 1252. See *McLucas* v. *DeChamplain*, 421 U.S. 21, 30–31 (1975).

B. Under The "Rule Of Necessity," Neither The District Judge Nor The Justices Of This Court Are Disqualified From Participating In The Disposition Of These Cases By Virtue Of 28 U.S.C. 455

The strictures imposed by the judicial disqualification statute, 28 U.S.C. 455, are not jurisdictional in nature and do not deprive this Court of the jurisdiction established by 28 U.S.C. 1252. Section 455 provides only that a judge "shall disqualify himself" in certain specified situations (App., *infra*, 1a), and nothing in its text or legislative history suggests in any way that it goes beyond the personal disqualification of the individual judge or affects the jurisdiction conferred upon the federal courts by statute.[12]

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[12] In their motions to affirm (79–983 Motion to Affirm 1; 79–1689 Motion to Affirm 1–2), appellees agreed that 28 U.S.C. 455 neither disqualifies the Justices of this Court from participating in the disposition of these cases nor affects the jurisdiction of the Court to hear these appeals.

With respect to the question of disqualification, each of the Justices of this Court is a member of the plaintiff classes certified by the district court in both cases pursuant to Fed. R. Civ. P. 23(b)(2) (see page 14 and page 16 note 11, *supra*).[13] In addition, as previously noted (see page 14 note 10 and page 16 note 11, *supra*), the district judge in these cases is a member of the classes in *Will II* but not in *Will I*. Accordingly, the Justices, as class members in *Will I* and *Will II*, and the district judge, as a class member in *Will II*, would appear to fall within the provisions of 28 U.S.C. 455(b)(4) and (5)(i) (App., *infra*, 1a) that disqualify any judge who has "a financial interest in the subject matter in controversy * * * or any other interest that could be substantially affected by the outcome of the proceeding"[14] or "[i]s a party to the proceed-

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[13] We note that a class member cannot opt out of a class certified under Fed. R. Civ. P. 23(b)(2). See 3B *Moore's Federal Practice* ¶¶ 23.31[3], at 23-262, and 23.60, at 23-466 (2d ed. 1980); 7A C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §§ 1775, at 31, and 1787, at 155 (1972); *id.* §§ 1775, at 27-28, and 1787, at 124 (1979 Supp.).

[14] "Financial interest" is defined in pertinent part (28 U.S.C. 455(d)(4); App., *infra*, 2a) as "ownership of a legal or equitable interest, however small * * *." The statutory provision concerning "any other interest that could be substantially affected by the outcome of the proceeding" (28 U.S.C. 455(b)(4); App., *infra*, 1a) was intended principally to apply to economic interests that are not encompassed within the definition of "financial interest." See, *e.g.*, *In re New Mexico Natural Gas Antitrust Litigation*, Nos. 80-1343, 80-1317 (10th Cir. May 5, 1980), slip op. 4; *In re Virginia Electric & Power Co.*, 539 F.2d 357, 367-368 (4th Cir. 1976); 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Civil* § 3547, at 366-367 (1975). See also *Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 95, 97, 101, 103 (1973) (statement of Professor E. Wayne Thode); E. Thode, *Reporter's Notes to Code of Judicial Conduct* 63, 66, 69, 70 (1973).

With regard to the Code of Judicial Conduct of the American Bar Association, we note that, in substantially revising 28 U.S.C. 455 in 1974, Congress intended to make "the statutory grounds for disqualifi-

ing."[15] Moreover, every currently sitting federal judge, whether or not formally a class member, is affected by the district court's statutory rulings (see pages 15, 17, *supra*, and pages 32–50, *infra*) that the 1977, 1978, and 1979 Pay Acts were not intended by Congress to supersede or modify the cost-of-living adjustments for Article III judges, and thus they would seem to have a sufficient interest in the outcome of the litigation to be disqualified under 28 U.S.C. 455(b)(4) and (a) (App., *infra*, 1a). See also *Evans* v. *Gore*, 253 U.S. 245, 247–248 (1920); *Atkins* v. *United States*, 556 F.2d 1028, 1035–1040 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

Notwithstanding the applicability of 28 U.S.C. 455, however, we believe that the district judge and the Justices of this Court are not required to disqualify themselves in these cases. In our view, the disqualification

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cation of a judge in a particular case conform generally with the recently adopted canon of the Code of Judicial Conduct which relates to disqualification of judges for bias, prejudice, or conflict of interest." S. Rep. No. 93-419, 93d Cong., 1st Sess. 1 (1973); H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 1-2 (1974). Accordingly, interpretations of the Code serve to illuminate the proper construction of Section 455. Provisions analogous to 28 U.S.C. 455 are contained in Canon 3(C) of the Code of Judicial Conduct, which has been adopted for federal judges by the Judicial Conference of the United States. See 69 F.R.D. 273 (1975); 73 F.R.D. 247, 254-255 (1977); H.R. Rep. No. 93-1453, *supra*, at 10-12.

[15] The Justices of this Court and the district judge are also subject to disqualification under 28 U.S.C. 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" (App., *infra*, 1a).

In line with the rationale of such decisions as *Evans* v. *Gore*, 253 U.S. 245, 247-248 (1920), and in light of the congressional intention to "broaden * * * the grounds for judicial disqualification" (S. Rep. No. 93-419, *supra*, at 1; H.R. Rep. No. 93-1453, *supra*, at 1-2), we construe Section 455(a) and (b) to apply to judges' financial or other interests arising out of their position as federal judges (including, as relevant here, their economic interest in their salary) and not to be limited to outside interests that are independent of their service in the judiciary.

issue should be resolved by invoking the "rule of necessity"—that a judge is not disqualified if there is no other judge able to decide the case. This rule ensures that the litigants and the public are not deprived altogether of the judicial processes provided by law. See, *e.g.*, *Evans* v. *Gore*, *supra*, 253 U.S. at 247–248; *Brinkley* v. *Hassig*, 83 F.2d 351, 357 (10th Cir. 1936); cf. *FTC* v. *Cement Institute*, 333 U.S. 683, 701 (1948). Additionally, a decision by this Court is especially appropriate and important in the instant cases, which present fundamental issues concerning the separation of powers between the Legislative and Judicial Branches and turn on the interpretation of a constitutional provision that the Court has had little occasion to consider.[16]

We also believe that Section 455 does not abrogate the "rule of necessity." The doctrine of necessity has been traced back to at least 1430 in England (see *Atkins* v. *United States*, *supra*, 556 F.2d at 1036) and, at the time Section 455 was amended in 1974, it had long been consis-

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[16] Of course, if all of the Justices of this Court are disqualified, there would be no quorum available to hear these appeals. See 28 U.S.C. 1. In the event that a direct appeal to this Court cannot be heard and determined because of the absence of a quorum of qualified Justices, 28 U.S.C. 2109 (79-983 J.S. App. 32a-33a) and 28 U.S.C. 291 *et seq.* provide that the Chief Justice may remit the case to the court of appeals for the appropriate circuit to render a final and conclusive decision. See also *Meeropol* v. *Nizer*, 429 U.S. 1337, 1339 (1977) (Marshall, Circuit Justice). However, the great majority of federal judges are members of one or more of the classes in these cases and thus would be disqualified; indeed, only one judge of the United States Court of Appeals for the Seventh Circuit is not a class member in *Will I*, and all Seventh Circuit judges are class members in *Will II* (there is currently one vacancy on the Seventh Circuit). Furthermore, while there may be judges from other circuits and from the district courts who are not class members in either case, every currently sitting federal judge is, as discussed in the text, affected by the district court's statutory decisions in these cases. Hence, all federal judges would be disqualified from participating in these appeals, and therefore the procedure established by 28 U.S.C. 2109 is unavailable.

tently adhered to by the federal and state courts in the United States (see, *e.g.*, 2 K. Davis, *Administrative Law Treatise* § 12.04 (1958); Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 611 (1947)), including expressly by this Court in *Evans* v. *Gore*, *supra*, and implicitly in *Miles* v. *Graham*, 268 U.S. 501 (1925), and *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939).[17] As the Court has recently observed, "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon* v. *University of Chicago*, 441 U.S. 677, 696–697 (1979). Likewise, it is also appropriate to assume that Congress does not intend to alter settled principles unless its intent to do so is clearly expressed. See, *e.g.*, *Owen* v. *City of Independence, Missouri*, No. 78–1779 (Apr. 16, 1980), slip op. 14–15; *Gooding* v. *United States*, 416 U.S. 430, 457–458 (1974); *Callanan* v. *United States*, 364 U.S. 587, 594 (1961); *Robertson* v. *Railroad Labor Board*, 268 U.S. 619, 627 (1925). These canons of construction are particularly well-founded in this instance, in light of the significant public purposes served by the rule of necessity and the constitutional difficulties that might be raised if every federal judge were rendered ineligible to sit in these cases.

Here, neither the language nor the legislative history of Section 455 contains any indication whatever that Congress intended to repudiate the rule of necessity. On the contrary, statements in the committee reports and hearings expressly indicate that Section 455 was designed merely to establish objective criteria for selecting which among many qualified judges should preside over a law-

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[17] See also *North American Co.* v. *SEC*, 327 U.S. 686 (1946), discussed in Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. Prob. 43, 44 (1970) (Chief Justice Stone withdrew his disqualification in order to provide a quorum on the Court).

suit; there is no evidence of an intention to abrogate the rule designed to cover the unique situation where all federal judges may technically be disqualified. Indeed, the statute's list of disqualifying factors was made exceedingly broad, and the allowable waivers from its terms were narrowly limited, because of the general understanding that other judges not subject to a disqualifying connection with the parties or issues in litigation would be available to hear the case. Thus, in explaining the expansive language of Section 455(a), which provides that a judge should recuse himself in any proceeding in which "his impartiality might reasonably be questioned," the House and Senate Reports stated:

> This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, *he should disqualify himself and let another judge preside over the case.*

S. Rep. No. 93-419, 93d Cong., 1st Sess. 5 (1973) (emphasis added); H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974) (emphasis added). Similarly, these reports observed that the parties should not be permitted to waive a judicial disqualification under Section 455(b) because

> the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver. There are approximately 667 federal judges, active and retired. *The statutes contain ample authority for chief judges to assign other judges to replace either a circuit or district court judge who becomes disqualified.*

S. Rep. No. 93-419, *supra*, at 7 (emphasis added); H.R. Rep. No. 93-1453, *supra*, at 7 (emphasis added). Numerous statements in the congressional hearings also express the same understanding that disqualification under Section

455 would simply result in the assignment of a different judge to hear the case.[18]

Thus, nothing in the text or legislative history of Section 455 suggests a congressional intent to reject the rule of necessity.[19] Moreover, no reason is evident why Congress would have intended to supplant this longstanding doctrine. The principal objective of Section 455 was to promote public confidence in the judicial system. That goal is not materially advanced, and in fact may be materially impaired, by effectively depriving certain litigants and the public at large of a judicial forum for the resolution of important legal issues.[20]

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[18] See *Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1971, 1973), at 15 (statement of Sen. Burdick); *ibid.* (statement of Sen. Bayh); 16 (statement of Sen. Bayh); 19 (statement of Sen. Gurney); 26 (statement of Sen. Hollings); 33 (statement of Mr. John P. Frank); 41 (statement of Mr. Frank); 50 (statement of Chief Counsel William P. Westphal); 61 (statement of Mr. Frank); 74 (statement of Sen. Burdick); 77 (statement of Sen. Hollings); 91 (statement of Mr. Westphal); 108–109 (statement of Professor E. Wayne Thode); 114 (statement of Mr. Frank); 118–119 (statement of Mr. Frank). See also *id.* at 189 (letter of May 26, 1964, from Professor Edmond Cahn to Hon. William J. Brennan, Jr.) ("[Section 455 contains a categorical disqualification standard] that I believe the justices would have to disregard in any one of the many situations exemplified by *Evans* v. *Gore*, 253 U.S. 245 * * *").

In addition, the attention of the Congress was repeatedly directed to the practical problems of disqualification in jurisdictions containing only a single district judge. See *Hearings*, *supra*, at, *e.g.*, 18–19, 21, 30, 40, 42–43, 84, 90–91, 117. In the end, Congress concluded that these difficulties did not constitute a substantial objection to Section 455. Nowhere in the course of its consideration, however, did Congress signify an intent to create a potentially far more serious problem by eliminating the rule of necessity.

[19] The legislative history of prior judicial disqualification statutes (see 36 Stat. 1090; 62 Stat. 908) also does not suggest any congressional intention to abandon the rule.

[20] We also note that the Advisory Committee on Judicial Activities, appointed by the Chief Justice to give advisory opinions to federal

Finally, the courts that have addressed the question are uniformly of the view that Section 455, as amended in 1974, did not eliminate the rule of necessity. See *Duplantier* v. *United States*, 606 F.2d 654, 662–663 (5th Cir. 1979), petition for cert. pending on other grounds, No. 79–1180 (filed Jan. 31, 1980); *Atkins* v. *United States*, *supra*, 556 F.2d at 1039–1040;[21] *Pilla* v. *American Bar Association*, 542 F.2d 56, 58–59 (8th Cir. 1976); *Foley* v. *Carter*, Civ. No. 79–3063 (D.D.C. Mar. 24, 1980), slip op. 2, appeal pending, Nos. 80–1548, 80–1551 (D.C. Cir. filed May 21, 1980); *United States* v. *Corrigan*, 401 F. Supp. 795, 798 (D. Wyo. 1975).[22]

Accordingly, Section 455 does not bar the district judge and the Justices of this Court from participating in these cases. As the forum designated by Congress in 28 U.S.C. 1252, this Court can and should hear the present appeals.

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judges on the Code of Judicial Conduct, has observed that, in addressing disqualification questions, it is a "major consideration of all concerned * * * that the courts must operate * * *." Advisory Opinion No. 26 (Jan. 22, 1973). See also Advisory Opinion No. 45 (Feb. 24, 1975); Advisory Opinion No. 52 (Aug. 15, 1977); Advisory Opinion No. 62 (undated), discussing unpublished letter opinion Doc. 78. These interpretations provide guidance on the meaning of Section 455 since, as discussed above (see pages 25–26, note 14, *supra*), Congress intended the statutory grounds for disqualification to conform with the provisions of the Code.

[21] In *Atkins*, the disqualification question was initially certified to this Court, but, after both parties agreed that the judges of the Court of Claims were not disqualified, the Court dismissed the certificate. *Atkins* v. *United States*, 426 U.S. 944 (1976).

[22] A similar result has been reached with respect to state judges under state rules of disqualification. See *Olson* v. *Cory*, 26 Cal. 3d 672, 609 P.2d 991, 997, 164 Cal. Rptr. 217, 223 (1980); *Nellius* v. *Stiftel*, 402 A.2d 359 (Del. Sup. Ct. 1978); *Dacey* v. *Connecticut Bar Association*, 170 Conn. 520, 368 A.2d 125, 128–129 (1976); *Schwab* v. *Ariyoshi*, 57 Haw. 348, 555 P.2d 1329 (1976); cf. *Dacey* v. *Dorsey*, 568 F.2d 275, 277 (2d Cir.), cert. denied, 436 U.S. 906 (1978); *Bonner* v. *Wyrick*, 563 F.2d 1293, 1296 n.3 (8th Cir. 1977), cert. denied, 439 U.S. 913 (1978).

II. AS A MATTER OF STATUTORY CONSTRUCTION, THE PAY ACTS SERVED TO SUPERSEDE OR RESCIND THE ANNUAL SALARY INCREASES AUTHORIZED FOR ARTICLE III JUDGES BY THE ADJUSTMENT ACT

Although the district court in both cases invalidated the Pay Acts on constitutional grounds, it also held that, as a matter of statutory construction, none of the Acts was intended by Congress to supersede or rescind the annual Adjustment Act increase authorized for Article III judges. Because affirmance of the district court's judgments on this statutory ground would obviate the need for the Court to consider the constitutional issues presented, we address ourselves at the outset to the statutory questions.[23]

A. The Pay Acts Were Intended Substantively To Supersede The Provisions Of The Adjustment Act

In a single paragraph at the end of its opinion in *Will I*, the district court ruled (79-983 J.S. App. 18a) that neither the 1976 nor the 1977 Pay Act "contains language which expressly or impliedly indicates that Congress was modifying or repealing the provisions of the Adjustment Act." Without examining the purpose or legislative history of the statutes, the court concluded (*ibid.*) that the 1976 Pay Act did not alter the substantive terms of the Adjustment

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[23] A direct appeal pursuant to 28 U.S.C. 1252 "brings before [the Court], not only the constitutional question, but the whole case * * *." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975). See also *United States* v. *Raines*, 362 U.S. 17, 20, 27 n.7 (1960); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 541 (1939). Thus, as appellees agree (79-983 Motion to Affirm 1, 14 n.10; 79-1689 Motion to Affirm 1, 13), the statutory issue is properly presented here and should be resolved before the Court turns to the constitutional questions involved in this case. See *City of Mobile, Alabama* v. *Bolden*, No. 77-1844 (Apr. 22, 1980), slip op. 3; *United States* v. *Clark*, No. 78-1513 (Feb. 26, 1980), slip op. 4-5; *Fusari* v. *Steinberg*, 419 U.S. 379, 387-388 n.13 (1975).

Act, but instead was merely an appropriations measure that refused to fund the 1976 Adjustment Act increases. The court did not separately consider the 1977 Pay Act (which was not an appropriation statute) but nonetheless concluded (*ibid.*) that this Act also did not modify or repeal the provisions of the Adjustment Act. Similarly, the court in *Will II*, relying on its *Will I* decision, found (79-1689 J.S. App. 8a, 10a) that the 1978 and 1979 Pay Acts were also appropriations measures that simply failed to finance the cost-of-living increases but did not substantively modify the salary levels under the Adjustment Act.[24]

In our view, the district court erred in construing the Pay Acts in this manner. "There can be no doubt that Congress could suspend or repeal* * * by an * * * appropriation bill" the Adjustment Act's authorization for the cost-of-living increases. *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940), and cases cited therein. See also *Zbaraz* v. *Quern*, 596 F.2d 196, 200-202 (7th Cir. 1979), appeals pending, Nos. 79-4, 79-5, 79-491 (argued Apr. 21, 1980); *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121, 133-134

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[24] We note that under the district court's interpretation that the Pay Acts did not substantively supersede the cost-of-living increases, claims for salary adjustments might be asserted by a great many officials whose salaries are affected by the Adjustment Act, including members of Congress, Cabinet officers and Executive Schedule personnel, Civil Service employees paid at the statutory ceiling, and other positions that are directly or indirectly subject to the provisions of the Adjustment Act (see page 6 and note 4, page 10 note 7, *supra*). Indeed, because, under the district court's construction, the 1977, 1978, and 1979 cost-of-living increases would be part of the base salary for subsequent years, such claims would not be limited to the particular fiscal year covered by each Pay Act but instead would continue in succeeding years (and be compounded) until the next quadrennial increase under the Federal Salary Act takes effect (currently scheduled for 1981). For this reason, recently appointed Article III judges who are not members of the classes in these cases may also be entitled to seek higher salaries based on the district court's statutory rulings (see page 26, *supra*).

(1st Cir.), cert. denied, 441 U.S. 952 (1979); *Director, Office of Workers' Compensation Programs* v. *Eastern Coal Corp.*, 561 F.2d 632, 650-651 (6th Cir. 1977); *Director, Office of Workmen's Compensation Program* v. *Alabama By-Products Corp.*, 560 F.2d 710, 719 (5th Cir. 1977); *City of Los Angeles* v. *Adams*, 556 F.2d 40, 48-49 (D.C. Cir. 1977); *Director, Office of Workers' Compensation Programs* v. *National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977). Accordingly, the only issue is whether Congress expressed with sufficient clarity its intention to enact substantive salary modifications by means of an appropriations act. See *United States* v. *Dickerson, supra*, 310 U.S. at 556, 561-562. See also *TVA* v. *Hill*, 437 U.S. 153, 189-191 (1978).[25] "'The whole question depends on the inten-

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[25]The instant cases differ from *TVA* v. *Hill* in several significant regards. In *Hill*, the Court rejected the argument that appropriations to complete the Tellico Dam Project had implicitly repealed the provisions of the Endangered Species Act that operated to prohibit further construction. In contrast to *Hill*, the underlying statute here—the Adjustment Act—established government obligations that, unless superseded by Congress, could be enforced in court, and it is simply not plausible to believe that Congress intended only to withhold funds while leaving the substantive obligations outstanding. Moreover, unlike in *Hill* (437 U.S. at 190), this case does not truly involve a repeal by implication, because there is at best a minor distinction between substantive and appropriations legislation in the context of expenditures for federal salaries. In addition, the appropriations in *Hill* "represented relatively minor components of the lump-sum amounts for the *entire* TVA budget" (*id.* at 189; emphasis in original), and in fact the acts "did not themselves identify the projects for which the sums had been appropriated" (*id.* at 189 n.35). Here, in contrast, it was unmistakable that the Pay Acts applied to salary increases under the Adjustment Act, and the legislative histories of the Pay Acts demonstrate that they were so understood; indeed, the very specificity of the provisions of the Pay Acts suggests that Congress considered and intended their particular consequences. Finally, as discussed below, the congressional intent to supersede the Adjustment Act increases was "clear and manifest" (*id.* at 189, quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)), and there was an "affirmative showing of an intention to repeal" the Adjustment Act authorization for

tion of Congress as expressed in the statutes.'" *Belknap* v. *United States*, 150 U.S. 588, 594 (1893), quoting *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883). Compare *Andrus* v. *Sierra Club*, 442 U.S. 347, 359–361 (1979).[26] We submit that the language, purpose, and history of the Pay Acts provide ample indication of Congress' intent substantively to supersede the Adjustment Act increases for fiscal years 1977–1980; indeed, as discussed below, a contrary construction of the Pay Acts merely to withhold funding for salary adjustments would defeat the very objectives expressly advanced by Congress in support of the statutes.

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such increases (437 U.S. at 190, quoting *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). See also *Zbaraz* v. *Quern*, *supra*, 596 F.2d at 201; *Preterm, Inc.* v. *Dukakis*, *supra*, 591 F.2d at 133–134.

[26] As the court of appeals explained in *City of Los Angeles* v. *Adams*, *supra*, 556 F.2d at 48–49 (footnotes omitted):

> According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws, including revision of expenditure authorization. In general, the doctrine disfavoring repeals by implications is said to apply "with full vigor" when the subsequent law is an appropriations measure. When Congress chooses to do so, however, we are bound to follow Congress's last word on the matter even in an appropriations law.

See also *Preterm, Inc.* v. *Dukakis*, *supra*, 591 F.2d at 134 ("Indeed, were these expressions of Congressional intent held to be insufficient in quantity or quality to legislate substantively, we would in candor be forced to admit that legislation in appropriations acts was, as a practical matter, out of the question. Such a determination, regardless of our view of the wisdom of the course chosen by the legislature, is clearly beyond the proper scope of this court").

We also note that the Congressional Research Service has concluded, with specific reference to the 1979 Pay Act, that Congress can legislate in an appropriations measure to determine salary levels notwithstanding the Adjustment Act's authorization for cost-of-living increases. See *Diminution of Judicial Salaries—A Consideration of the Constitutional Issue Raised by the Action of Congress With Respect to Judicial Salaries*, reprinted in 125 Cong. Rec. S16706, S16708–S16709 (daily ed. Nov. 15, 1979).

Moreover, the interpretation of the Pay Acts advocated by appellees (79-983 Motion to Affirm 14-21; 79-1689 Motion to Affirm 13-19) and adopted by the court below (79-983 J.S. App. 18a; 79-1689 J.S. App. 8a, 10a) is that Congress purposefully refused to pay the full salaries that, arguendo, it recognized were required by law. It should not lightly be presumed, however, that, at least in the absence of exceptional circumstances, Congress would act to deny funds to satisfy the government's conceded, lawful obligations under the Adjustment Act. "[I]t is not to be believed that Congress during all these years was simply appropriating a part of that which it knew was due to [federal judges and other officials]." *Belknap* v. *United States*, *supra*, 150 U.S. at 595. Rather, the more likely inference is that Congress intended to supersede the provisions of the Adjustment Act in order to modify the basic obligations themselves.[27]

1. The legislative history of the 1976 Pay Act clearly establishes that Congress intended to bar the 1976 Adjustment Act increases. The 1976 Pay Act, which was introduced on the floor of the House as an amendment to the

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[27] Appellees rely (79-983 Motion to Affirm 19) on the contention that the 1979 Pay Act, which is discussed in detail below (see pages 46-50, *infra*), was enacted by Congress in part to deny appropriations for cost-of-living adjustments that had already taken effect. However, the 1979 Pay Act involved a highly unusual situation in which, because of controversies concerning pay raises for members of Congress and Medicaid funding for abortions, Congress was unable to pass the Pay Act before the salary increases for fiscal year 1980 had become effective. In this unprecedented instance, Congress declined to appropriate funds to pay the full increases for the intervening period (which did not exceed 11 days for any pay schedule). No issue is presented in these appeals concerning this brief interim period, and we do not believe that the unusual events surrounding passage of the 1979 Pay Act, understood in context, detract in any way from the general proposition that an appropriations act should not ordinarily be presumed merely to withhold funds necessary to meet a recognized legal obligation.

Legislative Branch Appropriation Act of 1977 (122 Cong. Rec. 28861, 28872 (1976)), was part of the congressional effort to be held accountable "on [the] public record" when salaries are increased for top government officers (*id.* at 28872 (remarks of Rep. Shipley)) and to "strike a real blow for economy in Government" (*id.* at 28876 (remarks of Rep. Udall)). In introducing the provision, Representative Shipley, the chairman of the subcommittee, explained that the "amendment prevents the automatic cost-of-living pay increase * * * during the fiscal year ending September 30, 1977" (*id.* at 28872).[28] See also *id.* at 28862 (remarks of Rep. Shipley) ("My amendment is very simple. No [one]* * * will receive any increase in salary with regard to the cost-of-living increase"). This understanding—that the provision prohibited the cost-of-living adjustments—was repeatedly recognized in the floor debate on the Shipley Amendment.[29] Moreover, despite Representative

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[28] As originally proposed, the Shipley Amendment applied only to salary increases for members of the House of Representatives. However, the provision was later expanded to include all persons covered by the Federal Salary Act. See 122 Cong. Rec. 28877 (1976) (remarks of Rep. Udall). Although the Senate Committee on Appropriations initially recommended that this provision be deleted altogether (see S. Rep. No. 94-1201, 94th Cong., 2d Sess. 2 (1976)), the bill passed by the Senate included the provision but limited it to members of Congress. See 122 Cong. Rec. 29132 (1976) (remarks of Sen. Taft); *id.* at 29133, 29171, 29377. In the end, the Conference Committee accepted the House version that extended the 1976 Pay Act to all positions covered by the Federal Salary Act. See H.R. Conf. Rep. No. 94-1559, 94th Cong., 2d Sess. 3 (1976); 122 Cong. Rec. 31859 (1976) (remarks of Sen. Hollings).

[29] See, *e.g.*, 122 Cong. Rec. 28863 (1976) (remarks of Rep. Coughlin, the ranking minority member of the subcommittee) ("terminating the automatic cost-of-living increases * * * for this October"); *id.* at 28865 (remarks of Rep. Armstrong) ("preclude a cost-of-living increase * * * during the current fiscal year * * * [a] freeze of the salaries"); *ibid.* (remarks of Rep. Yates) ("freeze of the salaries"); *ibid.* (remarks of Rep. McClory) ("effectively eliminate the present cost-of-living increases"); *id.* at 28866 (remarks of Rep. Evans of Colorado) ("limita-

Wirth's explicit objection that it was inappropriate to enact substantive legislation in an appropriations bill (*id.* at 28865), the provision was overwhelmingly adopted by the House (*id.* at 28881, 28886–28887). And, in the course of agreeing to the Conference Report, the House debates again made clear that the 1976 Pay Act prohibited the cost-of-living increases scheduled to take effect in October 1976 under the Adjustment Act.[30]

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tion or reduction of * * * salaries"); *id.* at 28870 (remarks of Rep. Derwinski) ("freezing * * * pay at its current level"); *id.* at 28871 (remarks of Rep. Miller of Ohio) ("stopping the pay raise"); *ibid.* (remarks of Rep. Jeffords) ("delaying the cost-of-living increase [until the Quadrennial Review]"); *id.* at 28872 (remarks of Rep. Shipley) ("this amendment would * * * bar * * * cost-of-living increases * * * under [the Adjustment Act]"); *ibid.* (remarks of Rep. Armstrong) ("freeze the salary for the time being"); *id.* at 28874 (remarks of Rep. Grassley) ("[i]n times like these of the big budget deficit and the high inflation, we had better say 'no' [to the automatic cost-of-living increases]"); *ibid.* (remarks of Rep. Giaimo) ("turn down a [cost-of-living] increase"); *id.* at 28875 (remarks of Rep. Seiberling) ("would deny * * * a * * * cost-of-living increase"); *id.* at 28876 (remarks of Rep. Udall) ("there is not going to be a cost-of-living increase for [individuals covered by the Federal Salary Act]"); *id.* at 28877 (remarks of Rep. Bauman) ("would have the effect of prohibiting salary increases"); *id.* at 28878 (remarks of Rep. Smith of Nebraska) ("the amendment to freeze pay * * * at the present level"); *id.* at 28879 (remarks of Rep. Harris) ("prohibit [officials] from receiving an increase in their salaries * * * [T]his amendment * * * withholds an increase for the coming year * * * [T]he amendment [would] prohibit a pay raise"); *ibid.* (remarks of Rep. Anderson of California) ("block a cost-of-living pay increase for the Congress, Senators, super grades in the executive branch, and Federal judges"); *ibid.* (remarks of Rep. Vander Veen) (Shipley Amendment would "achieve the same end" as a bill Representative Vander Veen had previously sponsored to "eliminate cost-of-living increases for Congressmen"); *id.* at 28880 (remarks of Rep. Spellman) ("cutting back the salaries").

[30] See 122 Cong. Rec. 31892 (1976) (remarks of Rep. Shipley) ("the conferees agreed to * * * language that makes it clear * * * that no October cost-of-living increases would be made to judges, Members of Congress, and certain executive positions * * *. [The bill] proscribed * * * the October cost-of-living pay increases"); *id.* at 31893 (remarks of Rep. Coughlin) ("[conferees] clarified the Shipley amendment to in-

Senate consideration of the provision reflected the same understanding. The Senate Report stated that the Shipley Amendment "would prohibit the payment of the cost of living salary increase projected for October 1, 1976, to not only Representatives, but Senators, Federal judges and all other Federal personnel whose salaries are currently [at a given level]. * * * [T]he House language * * * would prohibit the cost of living increases authorized by [the Adjustment] Act." S. Rep. No. 94-1201, 94th Cong., 2d Sess. 2 (1976); see also 122 Cong. Rec. 29130 (1976) (remarks of Sen. Hollings). Similarly, the floor debate in the Senate contained repeated references to the fact that the Pay Act would eliminate the 1976 cost-of-living increase under the Adjustment Act.[31] This view was also expressed

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sure that the cost-of-living pay freeze, would be prospective rather than retroactive * * * [and] retain[ed] House language making other top grades subject to the * * * pay freeze"); *id.* at 31896 (remarks of Rep. Riegle) ("elimination of the cost-of-living raise"); *ibid.* (remarks of Rep. Patten) ("freeze on judges' and top officials' salaries * * * [as well as] our own").

[31] See, *e.g.*, 122 Cong. Rec. 29130 (1976) (remarks of Sen. Hollings) ("prohibit the payment of the cost of living salary increase projected for October 1, 1976 * * * prohibit the cost of living increases authorized by the [Adjustment Act]"); *id.* at 29131-29132 (remarks of Sen. Allen) ("a freeze on salaries in the upper levels of all three branches of Federal service"; "the salary freeze * * * [adopted by] the House of Representatives"; "the House amendment providing for a salary freeze for top Federal officials in all three branches of Government"); *ibid.* (remarks of Sen. Taft) ("effectively freeze those salaries—the employees would not be given a cost-of-living raise on October 1, or a salary increase"); *id.* at 29164 (remarks of Sen. Allen) ("freezing the compensation of Members of Congress, House and Senate, the members of the judiciary, and the top ranking members of the executive branch"); *id.* at 29171 (remarks of Sen. Muskie) ("a freeze on * * * salaries"); *ibid.* (remarks of Sen. Helms) ("prevent implementation of a salary increase brought about by this past year's inflation"); *id.* at 29172 (remarks of Sen. Allen) ("denied the upcoming increase on October 1 * * * [T]heir salaries [would be] frozen at the September 30, 1976, level * * *"); *id.* at 29371 (remarks of Sen. Mathias) ("waived the annual cost-of-living increase"); *id.* at 29372 (remarks of Sen. Bartlett)

by Senator Hollings, the subcommittee chairman, who, in submitting the Conference Report on the bill, emphasized that the 1976 Pay Act "bars cost-of-living increases * * * this October" and "insure[s] that none of the affected positions would receive this year's cost-of-living increase * * *." 122 Cong. Rec. 31859, 31860 (1976).[32] See also *id.* at 31862 (remarks of Sen. Percy) ("disallowing pay raises for Federal judges, top Government officials and employees, and members of Congress * * * a pay freeze"). Thus, we submit that the legislative history of the 1976 Pay Act demonstrates that Congress intended to supersede the provisions of the Adjustment Act authorizing cost-of-living increases to take effect in October 1976. See *Pressler* v. *Simon*, *supra*, 428 F. Supp. at 302, 304, 305.[33]

("automatic pay raises * * * [are] eliminated"); *id.* at 29374 (remarks of Sen. Mathias) ("freezing executive level salaries"). See also *id.* at 29168 (letter from Justin A. Stanley, President, American Bar Association, to Sen. Hollings) (the 1976 Pay Act passed by the House "to repeal those provisions of [the Adjustment Act] which provide for cost of living adjustments for members of Congress, federal judges and federal executives"). In addition, in connection with the March 1977 quadrennial increase under the Federal Salary Act, Senator Byrd noted that the only salary adjustment received by high-ranking government officials between 1969 and 1977 had been the October 1975 cost-of-living increase. See 123 Cong. Rec. 7094–7095 (1977).

[32] We recognize that Senator Hollings had earlier stated that the 1976 Pay Act was "undraftsmanlike" because it "did not say that the salaries would not be increased under the law, but that the funds could not be used for any increases. The basic law is still there. There is a lawsuit about some of those already frozen, and we will apparently have another suit under this one." 122 Cong. Rec. 29168 (1976). This ambiguous statement can best be read as a criticism of the draftsmanship of the provision rather than as an affirmation of Congress' intent to leave intact the 1976 Adjustment Act increases. Senator Hollings' later remarks, quoted in the text, indicate that he agreed with his colleagues that the Pay Act substantively eliminated the Adjustment Act increases for 1976.

[33] In arguing that the 1976, 1978, and 1979 Pay Acts were only temporary and therefore were not intended substantively to alter the pro-

2. Contrary to the conclusion of the district court, the 1977 Pay Act quite plainly was intended to supersede the Adjustment Act increases for fiscal year 1978. Unlike the 1976 Pay Act, the 1977 Act was not an appropriations measure at all, but rather a substantive enactment that provided that the cost-of-living increases contemplated for October 1977, including increases under 28 U.S.C. 461 for Article III judges, "shall not take effect" (79-983 J.S. App. 32a). As explained in the House Report:

> The sole purpose of [the bill] is to eliminate the expected October 1977 comparability adjustment for certain individuals in the executive, legislative, and judicial branches whose rates of pay were increased earlier this year pursuant to the recommendations of the Quadrennial Commission [under the Federal Salary Act].
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> * * * * *
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> [The bill] is designed to deal with the anomalous situation of Members of Congress, high level Federal executives, and Federal judges receiving two pay raises in the same calendar year. This legislation prevents the possibility of such an occurrence by pro-

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visions of the Adjustment Act (79-983 Motion to Affirm 16-17; 79-1689 Motion to Affirm 15-16, 23-24), appellees have confused the distinction between *substantive* legislation and *permanent* legislation. In our view, it is immaterial whether these Pay Act limitations are temporary or permanent; indeed, we concede that these Acts are effective only for the given fiscal year and expire by their terms at the end of that period. Rather, the critical inquiry is whether, as we contend, Congress intended to extinguish federal officials' entitlement to the Adjustment Act increase during the fiscal year or whether, as appellees assert, it intended only to withhold funding for that increase but to leave intact the substantive obligation that could be enforced through litigation. See *United States* v. *Dickerson*, *supra*, 310 U.S. at 555 (statute "suspended the allowance for re-enlistment *during the fiscal year* ending June 30, 1939") (emphasis added); *United States* v. *Mitchell*, *supra*, 109 U.S. at 150 ("Congress has * * * expressed its purpose to reduce, *for the time being*, the salaries of the interpreters") (emphasis added).

> viding that the anticipated October 1977 comparability adjustment should not take effect for those individuals whose rate of pay were increased earlier this year pursuant to the recommendations of the Commission on Executive, Legislative, and Judicial Salaries.
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> * * * * *
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> This bill provides that the first comparability adjustment which would be made pursuant to the Executive Salary Cost-of-Living Adjustment Act (Public Law 94-82) after the date of the enactment of this legislation shall not take effect. The effect of this legislation would be to deny the anticipated October 1977 pay comparability adjustment to the Vice President, Members of Congress, Federal judges and justices, executive branch officials under the executive schedule, and certain other officials in the legislative and judicial branches whose pay is established under [the Federal Salary Act].
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> * * * * *
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> The intent of this legislation is to eliminate [for positions subject to the Federal Salary Act] the entire October 1977 comparability adjustment which will be specified in the report of the President transmitted to the Congress under [the Comparability Act].

H.R. Rep. No. 95-458, 95th Cong., 1st Sess. 1, 2, 3 (1977).[34] In these circumstances, the district court's sum-

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[34] The House Report also stated that under the 1977 Pay Act "the salaries of certain positions and individuals * * * [covered by the Federal Salary Act] shall not be increased by the * * * [October 1977] comparability pay adjustment" (H.R. Rep. No. 95-458, *supra*, at 1) and that the Act would "deny[] the anticipated October 1977 comparability increase [for specified positions]" (*id.* at 3). In addition, the Report noted that enactment of the Pay Act would result in an estimated annual saving of $36 million-$46 million between fiscal years 1978 and 1982 (*ibid.*), a conclusion plainly at odds with appellees' argument that the Pay Act left unaltered the government's substantive obligations pursuant to the Adjustment Act.

In accord with the House Report, the House and Senate floor debates also consistently reflected the view that the 1977 Pay Act super-

mary conclusion that the 1977 Pay Act did not supersede the provisions of the Adjustment Act cannot be sustained.[35]

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seded the October 1977 Adjustment Act increases for high-ranking federal officials, including judges. See, *e.g.*, 123 Cong. Rec. 7095 (1977) (remarks of Sen. Byrd) ("salaries * * * shall not be increased * * * [the bill] will thus obviate the effect of the comparability pay provisions [in October 1977 for Federal Salary Act officials]"); *ibid.* (remarks of Sen. Baker) ("forgo and rescind that adjustment"); *id.* at 7096 (remarks of Sen. Church) ("exclude Congress and other top-level Federal officials from the cost-of-living benefit this year"); *ibid.* (remarks of Sen. Percy) ("deny for this year only the annual cost-of-living increase scheduled to take place on October 1 for top governmental officials"); *ibid.* (remarks of Sen. Dole) ("temporarily eliminate the annual comparability pay raise for top-level Federal employees * * * the comparability adjustment scheduled for October 1977 would not take effect"); *id.* at 7125 (remarks of Sen. Byrd) ("deny the comparability pay increase scheduled to take effect on October 1 * * * eliminating the single pay increase to take effect in October"); *id.* at 7126 (remarks of Sen. Scott) ("prevents people * * * from receiving two pay raises in 1 year"); *id.* at 21121 (remarks of Rep. Solarz) ("will not be entitled to receive that increase when it comes due * * * prevent the comparability increase for Members of Congress, Federal judges, and high-level Federal executives * * * knock[s] out the comparability increase for this year"); *id.* at 21123 (remarks of Rep. Derwinski) ("salaries which were increased last March will be excluded from the next comparability pay adjustment which will occur in October * * * the sole purpose of [the bill] is to eliminate the expected October 1977 comparability adjustment for individuals in the executive, legislative, and judicial branches [covered by the Federal Salary Act]"); *id.* at 21124 (remarks of Rep. Markey) ("eliminating the October comparability pay increase"); *ibid.* (remarks of Rep. Grassley) ("suspend the pay raise for October 1977"); *id.* at 21125 (remarks of Rep. Ammerman) ("deny the October 1 cost-of-living pay increase to Senators and Members of Congress, Federal judges and top Government officials").

The legislative history of the 1978 Pay Act (see page 44 and page 45 note 37, *infra*) further confirms that the 1977 Act "rejected" the Adjustment Act increases for the year, thereby imposing a "cap" on salaries of high-ranking government officials. In the same way, the House Report accompanying the 1979 Pay Act (see page 47 note 38, *infra*) stated that salaries in fiscal year 1978 had been "frozen" under the 1977 Pay Act.

[35] Indeed, in the district court, appellees described the 1977 Pay Act as a "single year repealer" of the Adjustment Act, and they did not contend, as they had with the 1976 Act, that it could be construed as

3. The legislative history of the 1978 Pay Act also demonstrates that Congress intended to bar the cost-of-living increases scheduled for October 1978. The House Report noted that the Pay Act was a "change [in] the application of existing law" (H.R. Rep. No. 95-1254, 95th Cong., 2d Sess. 31 (1978)) and explained that it

> provid[es] for *a pay freeze* for those individuals in the legislative, executive, and judicial branches and in the government of the District of Columbia, whose rate of pay was directly or indirectly increased as a result of the pay increases which went into effect in 1977 under the [Federal Salary Act]. Under the proviso, any individual whose rate of pay is $47,500, or more, is covered *by the freeze during fiscal year 1979*.

H.R. Rep. No. 95-1254, *supra*, at 35 (emphasis added); see also *id.* at 29, 39. The Senate Report expressed the same understanding, emphasizing that the 1978 Pay Act "continues for fiscal year 1979 the so called 'cap' on upper level salaries in the Legislative, Executive, and Judicial branches of government." S. Rep. No. 95-1024, 95th Cong., 2d Sess. 50 (1978).[36] And the floor debates consistently recognized that the 1978 Pay Act was designed to

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anything but a substantive amendment of the Adjustment Act. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 33.

Appellees now argue (79-983 Motion to Affirm 21) that "had Congress intended [the 1977 Pay Act] to effect a repeal of the Adjustment Act, it could have attempted to do so by the use of clear and unequivocal statutory language." But it is difficult to conceive a more unambiguous declaration of congressional intent than the statutory provision that the Adjustment Act increases for fiscal year 1978 "shall not take effect."

[36] We also note that the 1978 Pay Act expressly provides (79-1689 J.S. App. 23a; emphasis added):

> For purposes of administering any provision of law, rule, or regulation which provides retirement, life insurance, or other

eliminate the scheduled cost-of-living increase. In introducing the Act, Representative Shipley, the chairman of the subcommittee, stated that the Act "provides for a pay freeze for those individuals in the legislative, executive, and judicial branches * * * whose rate of pay was either directly or indirectly increased [in 1977 under the Federal Salary Act]." 124 Cong. Rec. H5507 (daily ed. June 14, 1978). Representative Armstrong, the ranking minority member of the subcommittee, similarly explained that "automatic cost-of-living increases will not be permitted * * * ." *Id.* at H5508.[37] In light of these clear expressions of congressional intent, the district court erred in holding that the 1978 Pay Act did not foreclose the Adjustment Act increases for fiscal year 1979.

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employee benefit, which requires any deduction or contribution, or which imposes any requirement or limitation, on the basis of a rate of salary or basic pay, *the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay.*

This provision, basing employee benefits and deductions on the employee's salary after application of the 1978 Pay Act, serves to confirm Congress' understanding that the Pay Act was a substantive limitation of the cost-of-living salary increase for fiscal year 1979.

[37] See also 124 Cong. Rec. H5509 (daily ed. June 14, 1978) (remarks of Rep. Derwinski) ("limit high-level salaries at this time, and that would include judiciary and executive branch as well as legislative"); *id.* at H5510 (remarks of Rep. Pattison) ("blocks Members of Congress and top-level Federal officials from receiving the 5-percent so-called cost-of-living salary adjustment this year. This is the second year in a row [since the March 1977 quadrennial increase] that we have refused a scheduled increase in our salaries. * * * [W]e rejected last year's adjustment and we are doing so again this year. * * * I am in complete agreement to turning down the pay raise this year"); *id.* at S12614 (daily ed. Aug. 4, 1978) (remarks of Sen. Sasser, the subcommittee chairman) ("freeze, during fiscal year 1979, the pay of any individual in the executive, legislative, and judicial branches of Government whose rate of pay is $47,500 per year or more"). In addition, the legislative history of the 1979 Pay Act (see page 47 note 38, *infra*) recognized that the 1978 Pay Act had "frozen" the salaries of high-ranking government officials.

4. An examination of the 1979 Pay Act likewise reveals that Congress intended the statute substantively to reduce the annual cost-of-living adjustment for fiscal year 1980. The Act explicitly states (79-1689 J.S. App. 24a-25a) that "notwithstanding the provisions of * * *the Executive Salary Cost-of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay * * *, [the 1978 Pay Act], which limit[s] the pay for certain Federal offices and positions, shall apply * * * for the fiscal year 1980 * * *." The 1979 Act further provides (*ibid.*) that, with respect to its application for fiscal year 1980, the 1978 Pay Act is amended to allow adjustments not to exceed 5.5% "for the purpose of limiting pay increases [for fiscal year 1980] to 5.5 percent." Finally, the 1979 Act also directs (*ibid.*) that the 5.5% increase "if accepted shall be in lieu of the 12.9 percent [otherwise] due for such fiscal year [1980]." On its face, then, the 1979 Pay Act clearly demonstrates that it was designed to limit the cost-of-living salary increases for fiscal year 1980 irrespective of the Adjustment Act or any other provision of law.

The legislative history of the 1979 Pay Act confirms that the legislation constituted a substantive enactment. The House Report stated that the Act "reduces Federal executive pay increases from the mandatory entitlement of 12.9 per centum to 5.5 per centum," a result that was recognized to be a "change [in] the application of existing law." H.R. Rep. No. 96-500, 96th Cong., 1st Sess. 7 (1979). In explaining the purpose of the Pay Act, the House Report further stated (*id.* at 3; emphasis added):

> Our problem is that our rate of inflation is so great that we must take immediate steps to moderate increases and help move toward stability.

> One of these places where such laws have taken over is that of Federal executive pay, which *under existing law* would increase by 12.9 percent.
>
> In an effort to help deal with these problems, the committee is providing that for the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who *under existing law* are entitled to approximately 12.9-percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5-percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year. This action, *sharply decreasing such automatic increases*, is taken in an effort to contribute toward the objective of immediately slowing and over a period eventually stopping further inflation. *The limitation of 5.5 percent represents a significantly sharp decrease* and amounts to only about one-fourth to one-third of the actual rate of inflation during this period. It is hoped that this example will be followed by other parts of the Federal Government, private industry, and State and local government. Unless we slow down, we face disastrous inflation which has wrecked the economy of other nations.[38]

The Conference Report reiterated that, in order to help combat the urgent national problem of inflation, the 1979 Pay Act "restricts Cost-of-Living increases to 5.5 percent instead of the 12.9 percent provided by law, for executive employees, including Cabinet officers, agency heads, Members of the House of Representatives and Senators, federal judges, various high ranking departmental and agency officers, certain supergrade personnel, and others * * *." H.R. Conf. Rep. No. 96-513, 96th Cong., 1st Sess.

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[38]The House Report also recognized (H.R. Rep. No. 96-500, *supra*, at 3) that "in the last 2 years * * * [since the quadrennial review of 1977] Federal executive pay has been frozen."

3 (1979). And the debate in both Houses plainly disclosed the congressional understanding that the 1979 Pay Act would restrict the salary increase for fiscal year 1980 to 5.5% and thereby prevent the larger increase provided under the Adjustment Act.[39]

Thus, we submit that Congress unquestionably intended the Pay Acts to supersede the provisions of the Adjustment Act authorizing cost-of-living increases for fiscal years 1977–1980.

B. The 1979 Pay Act Is Applicable To Article III Judges

With respect to the 1979 Pay Act, the additional statutory question is presented whether the Act applies at all to

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[39] See 125 Cong. Rec. H8850 (daily ed. Oct. 9, 1979) (remarks of Rep. Latta) ("the 5.5 percent the Committee on Appropriations has allowed * * * is a reduction from the 12.9 percent authorized under present law"); *id.* at H8852 (remarks of Rep. Whitten, chairman of the committee) ("[t]his action * * * sharply decreas[es] such automatic increases"); *id.* at H8854 (remarks of Rep. Jacobs) ("rollback of the automatic 12.9-percent salary increase"); *id.* at S14320 (daily ed. Oct. 10, 1979) (remarks of Sen. Magnuson) ("a 5.5 percent pay raise"); *id.* at S14483 (daily ed. Oct. 12, 1979) (remarks of Sen. Young) ("a 5.5 percent pay raise * * * [the Act would] reduce the 12.9 [percent salary increase] to 5.5 percent. * * * This provides for limiting the cost-of-living increase to 5.5 percent, rather than the 12.9 percent automatic increase now in effect"); *ibid.* (remarks of Sen. Byrd) ("put a cap on that [12.9 percent] pay increase and make it 5.5 percent"); *id.* at S14484 (remarks of Sen. Magnuson) ("this is in the nature of a cap, a limitation [on the 12.9 percent increase]"); *id.* at S14486 (remarks of Sen. Stevens) ("the 5.5 [percent] pay cap"); *id.* at H9076 (remarks of Rep. Whitten) ("a cap on the amount of compensation * * * which limits the amount to the 5.5 percent as against the 12.9 percent which is provided by law, but for which no appropriation has been made"); *id.* at H9080 (remarks of Rep. Conte, ranking minority member of the committee) ("reduces from 12.9 to 5.5 percent the increase in pay"); see also 125 Cong. Rec. S16706 (daily ed. Nov. 15, 1979) (remarks of Sen. Mathias) ("lowering the judicial salaries on October 12, along with those of other senior Federal officers").

federal judges. Appellees argue (79-1689 Motion to Affirm 18-19), and the district court indicated that it was "inclined to agree" (79-1689 J.S. App. 9a), that the Act is inapplicable to judges because it is limited to "executive employees, which includes Members of Congress" (*id.* at 24a).[40]

We submit that the 1979 Pay Act by its terms does apply to the judiciary because the phrase "executive employees," as used in this area of the law, is a term of art that includes federal judges. Indeed, the very statute that provides the annual salary increase for judges is entitled the "*Executive* Salary Cost-of-Living Adjustment Act" (79-1689 J.S. App. 14a; emphasis added). The phrase "executive employees" in the 1979 Pay Act therefore should be understood to mean those persons whose cost-of-living increases are governed by the Adjustment Act.[41] Moreover, wholly apart from the provision cited by appellees, the 1979 Pay Act expressly states that the 1978 Pay Act, as amended to allow a limited 5.5% cost-of-living increase, "shall apply" to the fiscal year 1980 adjustments (79-1689 J.S. App. 24a). Since the 1978 Act plainly covers

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[40] See also *Foley* v. *Carter*, Civ. No. 79-3063 (D.D.C. Mar. 24, 1980), appeal pending, Nos. 80-1548, 80-1551 (D.C. Cir. filed May 21, 1980). In *Foley*, an action brought by the Director of the Administrative Office of the United States Courts, the district court held, in agreement with the contention of appellees here, that the 1979 Pay Act "does not apply to the judicial branch" (slip op. 11). The Congressional Research Service, on the other hand, has concluded that the 1979 Pay Act does apply to judges' salaries. See *Diminution of Judicial Salaries*, *supra*, 125 Cong. Rec. at S16707. Likewise, appellees themselves have earlier acknowledged (79-983 Motion to Affirm 19) that the 1979 Pay Act is applicable to federal judges.

[41] Under this reading, the parenthetical phrase "which includes Members of Congress" is nothing more than a deliberate redundancy designed to emphasize, in the context of the political process, that congressional salaries were explicitly subject to the limitations of the 1979 Pay Act.

the "judicial branch" (*id.* at 22a), it is evident that the 1979 Pay Act on its face is applicable to federal judges.

This conclusion is strongly supported by the legislative history of the 1979 Pay Act. The Conference Report unambiguously stated that the Act "restricts Cost-of-Living increases to 5.5 percent instead of the 12.9 percent provided by law, for executive employees, including * * * federal judges * * *." H.R. Conf. Rep. No. 96-513, *supra*, at 3. Similarly, Representative Whitten, the manager of the Act in the House, explained that the Act "appl[ies] the 5.5-percent cap to the Federal judges * * *" (125 Cong. Rec. H8853 (daily ed. Oct. 9, 1979)). Other legislators also acknowledged the applicability of the Act to federal judges. See *id.* at H8850 (remarks of Rep. Latta); *id.* at H8854 (remarks of Rep. Jacobs); *id.* at S14486 (daily ed. Oct. 12, 1979) (remarks of Sen. Stevens); see also *id.* at H8138-H8139 (daily ed. Sept. 19, 1979) (remarks of Rep. Derwinski); *id.* at S16706 (daily ed. Nov. 15, 1979) (remarks of Sen. Mathias). Nothing in this legislative record suggests in any way that federal judges, who had consistently been included in the several preceding Pay Acts, were to be exempted from the 1979 Pay Act.[42]

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[42] We recognize that some members of Congress doubted whether the 1979 Pay Act could constitutionally be applied to federal judges to reduce the cost-of-living salary increase that had previously become effective. See 125 Cong. Rec. S14486-S14487 (daily ed. Oct. 12, 1979) (remarks of Sen. Stevens); see also *id.* at S16706 (daily ed. Nov. 15, 1979) (remarks of Sen. Mathias). Other members of Congress took the position that application of the Act to federal judges would not be unconstitutional and urged that the matter be resolved by the courts. See *id.* at H8854 (daily ed. Oct. 9, 1979) (remarks of Rep. Jacobs). Still others noted the issue and recommended that it be left to the courts. See *id.* at H8852 (remarks of Rep. Whitten); cf. *id.* at H8850 (remarks of Rep. Latta). However, all of these statements concerning the constitutionality of the Act, including the remarks of Senator Stevens relied on by appellees (79-1689 Motion to Affirm 18-19 n.12) and by the district court in *Foley* v. *Carter*, *supra*, slip op. 10-11, were premised

III. THE 1976, 1977, AND 1978 PAY ACTS DID NOT DIMINISH THE COMPENSATION OF ARTICLE III JUDGES

Assuming the Court finds that Congress intended the Pay Acts to supersede the Adjustment Act increases, we submit that the 1976, 1977, and 1978 Pay Acts did not diminish the "compensation" of Article III judges because, at the time these statutes were enacted, the annual cost-of-living adjustments had not yet become a part of the judges' salaries. Accordingly, the 1976, 1977, and 1978 Pay Acts, in failing to allow the expected increases to occur, did not constitute a diminishment of compensation within the meaning of the Compensation Clause.[43]

The district court in *Will I* held that, upon enactment of the Adjustment Act in 1975, "the right to an annual adjustment, measured by the average adjustment in the General Schedule, became a part of a judges' [*sic*] compensation which may not be 'diminished.' * * *[The Compensation Clause requires] that once the method [for determining judicial compensation] is selected it not be altered to diminish the compensation to which judges are

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on the recognition that the Act, as drafted and eventually signed into law, did apply to judges.

We also note that identical language regarding "executive employees, which includes Members of Congress" was contained in an earlier version of the 1979 Pay Act that, if passed, would have superseded the 1979 adjustments before they took effect. See 125 Cong. Rec. H8444 (daily ed. Sept. 25, 1979). Thus, it cannot be argued that the language of the 1979 Pay Act was designed to exempt federal judges because of congressional concern over the constitutionality of reducing salary increases that had already gone into effect for judges.

[43] Since Congress enacted the 1979 Pay Act on October 12, 1979, 11 days after the cost-of-living increase for fiscal year 1980 had gone into effect for judges (see pages 11–13, *supra*), the 1979 Pay Act cannot be defended on the ground that it was not a diminution of the judges' compensation. No issue is presented in this case concerning judges' pay for the period October 1 through October 11, 1979.

entitled" (79-983 J.S. App. 8a, 14a-15a). The court reiterated this view in *Will II*, stating that "subsequent to the 1975 [enactment of the Adjustment Act], the judge's compensation became an annual salary as adjusted by the cost-of-living increase percentage" (79-1689 J.S. App. 6a).[44] Based on this definition of compensation, the court concluded that the failure to pay the 1976, 1977, and 1978 cost-of-living increases amounted to a diminution that contravened the Compensation Clause.

We believe that the district court misconstrued the operation of the Adjustment Act and the meaning of the Compensation Clause in this regard. Although, as the district court noted, Congress has provided that federal judges "shall receive a salary at an annual rate determined under [the Federal Salary Act], as adjusted by [the Adjustment Act]" (79-1689 J.S. App. 16a), the Adjustment Act itself expressly specifies that the annual adjustment for judges becomes effective as of the first day of the month in which a GS adjustment takes effect pursuant to the Comparability Act (see page 8, *supra*).[45] Prior to that

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[44] As appellees state the point (79-983 Motion to Affirm 25; 79-1689 Motion to Affirm 22), "while the salary adjustment might not be paid out until October 1 of each year * * * the entitlement to that adjustment 'vested' with the enactment of the 1975 Executive Cost-of-Living Adjustment Act."

[45] The Adjustment Act explicitly provides that, as of the effective date for a cost-of-living increase, "each salary rate * * * shall be adjusted" in accordance with the Comparability Act increases in the GS salaries (79-983 J.S. App. 26a). This use of the future tense further indicates the congressional intent that the Adjustment Act increases were not part of a judge's compensation until they actually took effect.

The legislative history of the Adjustment Act confirms that Congress intended the annual cost-of-living adjustment to take effect for the particular fiscal year in accordance with the effective day of the GS adjustment under the Comparability Act. See S. Rep. No. 94-333, 94th Cong., 1st Sess. 4 (1975) ("The adjustment would take effect at the beginning of the first month in which the adjustment under [the Com-

time, the Adjustment Act increases for the fiscal year are not yet in effect, and judges, like other officials covered by the Adjustment Act, have only an expectancy that they will receive the anticipated adjustment, not an entitlement or a vested right to it. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).[46] Until the annual cost-of-living increases actually take effect for each fiscal year and thus become a part of their compensation—*i.e.*, become payment "receive[d] for their services" (Article III, Section

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parability Act] occurs. Unless altered by an alternative plan proposed by the President, * * * [the Comparability Act] adjustment occurs as of the beginning of the first applicable pay period commencing on or after October 1 of each year"); 121 Cong. Rec. 25745 (1975) (remarks of Sen. McGee in introducing the Adjustment Act) ("[the adjustment] would go into effect October 1 each year"); *id.* at 25374 (remarks of Sen. McGee) ("[t]he adjustment would become effective whenever a comparability increase is made in the statutory pay systems, usually in October of each year"); *id.* at 25382 (remarks of Sen. McGee) ("[u]nder this law, as being amended here, [the increase] would come at the regular time that it does under the existing law now, and that is by October 1").

[46] We note that any one of several contingencies could defeat the judges' expectation of a cost-of-living adjustment. For example, it might be that an increase in the GS rates of pay is not warranted pursuant to the Comparability Act, in which case there would be no increase under the Adjustment Act; the President could determine, in light of national emergency or adverse economic conditions, that a GS increase is inappropriate notwithstanding the principle of comparability; Congress could, as appellees concede (Plaintiffs' Reply Brief in Support of Their Motion for Summary Judgment, at 5 n.5, 8–9), repeal the Comparability Act or otherwise eliminate the GS adjustment; Congress could repeal the Adjustment Act altogether; or, as occurred in 1976, 1977, 1978, and 1979, Congress could supersede the increases contemplated by the Adjustment Act for high-ranking federal officials. These possibilities illustrate the contingent and defeasible nature of appellees' claim to an Adjustment Act increase for any particular fiscal year. Cf. *Benedict* v. *United States*, 176 U.S. 357, 360–361 (1900).

1)—federal judges have no unalterable right to those increases. Cf. *United States* v. *Larionoff*, 431 U.S. 864, 879 (1977) ("Congress may prospectively reduce the pay of [government officials], even if that reduction deprived * * *[them] of benefits they had expected to be able to earn"). This analysis reflects the established distinction between withholding a benefit that is expected to be conferred in the future, such as an anticipated cost-of-living adjustment, and withdrawing a benefit that is already being enjoyed, such as an operative salary increase. As the Court recently explained in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 9, 10, 11 (1979) (parole release):

> There is a crucial distinction between being deprived of a * * *[benefit] one has, * * * and being denied a * * * [benefit] that one desires.
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> * * * * *
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> The differences between an initial grant of * * *[a benefit] and the revocation of * * *[an existent benefit] are well recognized.
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> * * * * *
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> That the [government] holds out the *possibility* of * * * [a benefit] provides no more than a mere hope that the benefit will be obtained. [Emphasis in original.]

Furthermore, we do not believe this issue would be materially different if the Adjustment Act had expressly reserved to Congress the power to supersede an annual salary increase prior to its effective date. Such authority to amend or repeal legislation is necessarily retained by Congress in all cases. See, *e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534 (1962) (plurality opinion); *United States* v. *Dickerson*, *supra*, 310 U.S. at 555; *Butler* v. *Pennsylvania*, 51 U.S. (10 How.) 402, 416–417 (1850); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). Under the

hypothetical statute, however, it seems inconceivable that appellees would insist that their right to the increase had accrued before the effective date had passed. In our view, this illustrates the highly theoretical and technical basis for appellees' claim of a current entitlement to all future salary increases authorized by the Adjustment Act. Accordingly, we submit that the Compensation Clause does not preclude Congress from acting, before the cost-of-living increase takes effect, to supersede the scheduled adjustment.[47]

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[47] The California Court of Appeals has similarly concluded that a prospective cost-of-living adjustment is not part of a judge's salary and that the elimination of such a prospective increase is not a reduction in salary:

> [I]t is one thing to view [the California Constitution] as protective of salary increases that have become due and payable, and another to argue * * * that it also prevents modification of all prospective salary adjustments.
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> * * * * *
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> Although [the California statute] provided that judges would receive annual cost-of-living increases, those future increases did not become *salary* within the meaning of [the California Constitution] until they had become payable as current salary. * * *
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> * * * Elimination of a [p]rospective [i]ncrease in [s]alary [i]s [n]ot a [r]eduction in [salary].

Olson v. *Cory*, 93 Cal. App. 3d 942, 156 Cal. Rptr. 127, 138, 140, (1979), rev'd, 26 Cal. 3d 672, 609 P.2d 991, 164 Cal. Rptr. 217 (1980). Although neither the decision of the California Court of Appeals nor the decision of the California Supreme Court is controlling on the federal constitutional issues presently before this Court, we suggest that the Court should look to the opinion of the California Court of Appeals as the better reasoned and more persuasive discussion of the relevant considerations.

The position we urge here—that the elimination of a future salary increase is not a diminution of compensation within the meaning of the Compensation Clause—has also been reached by the Congressional Research Service. See *Diminution of Judicial Salaries*, *supra*, 125 Cong. Rec. at S16708 (footnotes omitted):

> Assume enactment of a law setting judicial salaries at x amount; the law would probably fix a date at which it became effective,

Moreover, this result is consistent with the history of the Compensation Clause. As originally proposed, the Clause would have prohibited increases as well as de-

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say, judges are to receive x amount beginning October 1. Although the measure is law, it would appear that prior to October 1, Congress could enact a new law providing for x-y compensation, since the statute had not gone into operation and judges were not yet entitled to the amount. And, indeed, it would appear that Congress could provide that x-y is to be the compensation in an appropriations law. The assumption is that until the effective date of the increase, Congress may repeal or alter it.

The cases upon which appellees rely (79-983 Motion to Affirm 23-25; 79-1689 Motion to Affirm 21-23) are not to the contrary. In *United States* v. *More* (C.C.D.C. 1803), set forth at 7 U.S. (3 Cranch) 159, 160-165 n. (1805), the circuit court held that an act of Congress abolishing the fees received by justices of the peace was invalid under the Compensation Clause with respect to a magistrate already in office, and it therefore sustained a demurrer to an indictment charging the unlawful receipt of such fees. These fees were clearly a part of the established compensation of the justices of the peace; although the fees were determined and payable at the time services were rendered, the justices' legal entitlement to receive the fees existed at the time the statute abolishing the fees was enacted, and such fees had previously been received pursuant to that authority. No question was presented in *More* concerning the operative date of the justices' entitlement to this compensation, and no argument was made that the statute did not diminish the justices' compensation. In contrast, the question in the instant cases is whether the Pay Acts prevented the expected cost-of-living increases from taking effect and therefore did not reduce appellees' compensation. While *More* supports the view that the Compensation Clause extends to elements of judges' compensation that have gone into effect but have not yet been paid, it does not address the distinct issue whether such compensation has in fact taken effect.

Likewise, *Stiftel* v. *Malarkey*, 384 A.2d 9 (Del. Sup. Ct. 1977), is also inapposite here. The court in *Stiftel* rejected the argument that there was a difference in principle between application of a statutory adjustment formula and an increase of a specified dollar amount (*id.* at 16). We agree that there is no meaningful distinction, for purposes of the protections accorded judges' compensation, between a liquidated or sum-certain increase and an increase calculated on the basis of a formula. In our view, however, such an increase, in whatever form, does not become part of the judges' compensation until its effective date, and we do not read *Stiftel* to have passed on this latter issue.

creases in judges' compensation. See Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308, 312–313 (1976); Fellman, *The Diminution of Judicial Salaries*, 24 Iowa L. Rev. 89, 91 (1938). On Gouverneur Morris' motion, the prohibition on increases was deleted. Rosenn, *supra*, 24 U.C.L.A. L. Rev. at 313; Fellman, *supra*, 24 Iowa L. Rev. at 91. James Madison strongly opposed this change, arguing that it would lead to judicial dependence on the legislature. Rosenn, *supra*, 24 U.C.L.A. L. Rev. at 313–314; Fellman, *supra*, 24 Iowa L. Rev. at 91–92. As Madison stated:

> The dependence will be less if the *increase* alone should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter. [Emphasis in original.]

2 M. Farrand, *The Records of the Federal Convention of 1787* 45 (1966). Morris' motion to strike the prohibition on increases was carried, and Madison's subsequent attempts to reinstate the restriction proved unsuccessful. Rosenn, *supra*, 24 U.C.L.A. L. Rev. at 314 & n.24; Fellman, *supra*, 24 Iowa L. Rev. at 92. Thus, the history of the Compensation Clause reveals that, notwithstanding concerns expressed about the effect on judicial independence, the Founding Fathers deliberately empowered Congress to raise, or to refuse to raise, the salaries of federal judges. See *Atkins* v. *United States*, 556 F.2d 1028, 1051 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978) (authority of Congress to increase or decline to increase judicial salaries "permits and even contemplates a 'feeling of dependence upon the legislature' to an extent"). In our view, there is no meaningful difference between the authority of

Congress, recognized by the drafters of the Compensation Clause, to consider but refuse to enact salary increases for Article III judges and its analogous authority to rescind an increase that has not yet gone into effect.

Finally, the district court's holding—that future increases under the Adjustment Act are part of a judge's compensation protected by the Compensation Clause—would unduly limit the constitutional province of Congress. Under the decisions below, Congress would be forever prevented from modifying the law in any manner that would afford sitting Article III judges a lesser salary than they would receive pursuant to the annual operation of the Adjustment Act.[48] Indeed, appellees assert that this consequence is the "virtue, not [the] vice," of the Compensation Clause (79-983 Motion to Affirm 27 n.25):

> [T]he only limitation [the Compensation Clause] imposes is * * * that once a system is selected * * * the system may not be altered in a manner that would deprive a judge of any compensation that system provides.

We doubt that the Compensation Clause and the Adjustment Act can sensibly be read, as the district court did, to provide a perpetual guarantee that judges will continue to receive not only their present salaries but also "an annual adjustment, measured by the average adjustment in the General Schedule" (79-983 J.S. App. 8a), and thus permanently to freeze into law, as a matter of constitutional doctrine, the Adjustment Act plan that Congress adopted only five years ago. Such a result would be a serious and wholly unjustified intrusion upon the constitutional powers of Congress and might serve to inhibit innovation and ex-

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[48]The district court's reasoning also suggests that the Federal Salary Act of 1967 would likewise be frozen into law with respect to sitting federal judges.

perimentation in this area and to discourage enactment of additional benefits for judges.[49]

In light of this analysis, the 1976, 1977, and 1978 Pay Acts did not diminish the compensation of Article III judges. The Comparability Act increases for 1976, 1977, and 1978 became effective in October of each year, and therefore, but for the Pay Acts, the annual adjustments for judges would have taken effect on October 1.[50] Prior to that time, judges had neither received nor become entitled to receive a cost-of-living increase under the express terms of the Adjustment Act. Accordingly, the 1976, 1977, and 1978 Pay Acts, by forestalling the annual increases, did not violate the Compensation Clause.[51]

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[49] As the California Court of Appeals explained in *Olson* v. *Cory*, *supra*, 156 Cal. Rptr. at 140–141 (see note 47, *supra*):

> The complexity of [the legislature's] task [in setting salaries] counsels judicial caution in construing * * * the Constitution so broadly that any experiment with a new mechanism for determining future salary increases becomes cast in constitutional stone.
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> * * * * *
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> Plaintiffs' interpretation of [the Constitution], if accepted, would seriously cripple the power of the Legislature to take effective action in an important and sensitive area of its concern—its fixing of judicial salaries * * *. Under plaintiffs' interpretation the Legislature would become a kind of sorcerer's apprentice—able to turn on the money spigot but never able to shut it off. It is one thing to insist, as the Constitution does, that a present salary, once established, may not be reduced during a judge's term of office; it is another to argue that a legislative experiment to find a better mechanism for setting judicial salaries has been transmuted into an irreversible economic grant.

[50] See pages 8–13, *supra*.

[51] The 1977 and 1978 Pay Acts were enacted, respectively, on July 11, 1977, and September 30, 1978 (see pages 10–11, *supra*). The 1976 Pay Act was passed by the House on September 1, 1976, and by the Senate on September 8; the Conference Report was adopted by both Houses on September 22. See 122 Cong. Rec. 28881, 29377, 31863,

IV. THE COMPENSATION CLAUSE IS NOT VIOLATED BY A STATUTORY DIMINUTION OF JUDICIAL SALARIES THAT DOES NOT DISCRIMINATE AGAINST ARTICLE III JUDGES OR UNDERMINE THEIR INDEPENDENCE

With respect to the 1979 Pay Act (see page 51 note 43, *supra*), and to the extent the Court concludes that the 1976, 1977, or 1978 Pay Act resulted in a diminution of judges' salaries, we submit that the Compensation Clause is not violated by a statute that, like the Pay Acts, does not discriminate against Article III judges or undermine their independence.

Although this Court has had little occasion to consider the Compensation Clause, the purpose of the Clause is well established. As Alexander Hamilton explained in *The Federalist* No. 79, the Clause was intended "to put it out of the power of [Congress] to change the condition of the individual [judge] for the worse. A man may then be sure

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31896-31897 (1976). However, the bill was not signed by the President until October 1, the day that the Adjustment Act increases for judges would otherwise have taken effect, and also the day that Exec. Order No. 11941 (3 C.F.R. 151 (1976 Compilation)), implementing the Adjustment Act for that year, was issued. Appellees contend (79-983 Motion to Affirm 22-23) that for at least a few hours on October 1, 1976, they were entitled to the increased pay that the 1976 Pay Act then purported to take from them. The general rule has long been established, however, that, unless otherwise required by "substantial justice," a statute is deemed effective from the first moment of the day on which it was enacted regardless of the precise time it was actually approved by the President. See *Taylor* v. *Brown*, 147 U.S. 640, 645-646 (1893); *United States* v. *Norton*, 97 U.S. 164, 170 (1877); *Lapeyre* v. *United States*, 84 U.S. (17 Wall.) 191, 198 (1872); *Central Maryland Lines, Inc.* v. *United States*, 240 F. Supp. 254, 257 (D. Md. 1965). Here, no penalty of any kind is imposed by the 1976 Pay Act, and no other reason of "substantial justice" requires departure from the general rule. See *Louisville* v. *Savings Bank*, 104 U.S. 469, 478-479 (1881); *Burgess* v. *Salmon*, 97 U.S. 381 (1878); *United States* v. *Casson*, 434 F.2d 415, 418-419 (D.C. Cir. 1970). Thus, the 1976 Pay Act precluded the Adjustment Act increases from taking effect, and appellees were never entitled to the 1976 cost-of-living adjustment.

of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation." The same explanation was offered by the Court in *Evans* v. *Gore*, *supra* 253 U.S. at 248, 253:

> With what purpose does the Constitution provide that the compensation of the judges "shall not be diminished during their continuance in office"? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function?
>
> * * * * *
>
> [T]he primary purpose of the prohibition against diminution was * * *, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

See also *id.* at 265 (Holmes, J., dissenting). The Court reiterated this understanding in *O'Donoghue* v. *United States*, 289 U.S. 516, 530–534 (1933), where, in discussing the propriety of judges' commencing litigation concerning their own salaries, it stated (*id.* at 531, 533):

> In framing the Constitution therefore, the power to diminish the compensation of the federal judges was explicitly denied, in order, *inter alia*, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor of or avoid the displeasure of [Congress] which, as master of the purse, would otherwise hold the power to reduce their means of support.
>
> * * * * *

> [The Compensation Clause was designed] not for [the judges'] private advantage * * * but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people.

See also *Toth* v. *Quarles*, 350 U.S. 11, 16 (1955); *Atkins* v. *United States*, *supra*, 556 F.2d at 1043-1045, 1048-1049, 1051.

The leading, and most recent, decision of this Court regarding the Compensation Clause is *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939). In *Woodrough*, the Court upheld the validity of the federal income tax statute as applied to federal judges who assumed office after the passage of the statute. Finding that the tax did not discriminate against federal judges or impair the independence of the federal judiciary, the Court rejected the contention that the statute infringed the Compensation Clause (*id.* at 281-282; footnotes omitted):

> [T]he question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1, of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also

> citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

Woodrough expressly overruled (307 U.S. at 283) the decision in *Miles* v. *Graham*, 268 U.S. 501 (1925), which had invalidated, under the Compensation Clause, the application of the income tax to federal judges appointed after the inception of the tax. *Woodrough* also criticized the decision in *Evans* v. *Gore*, *supra*, which had overturned the federal income tax statute as applied to federal judges who took office prior to enactment of the tax. The Court in *Woodrough* noted that *Evans* "was contrary to the way in which [the Compensation Clause] was read by other English-speaking courts * * * [,] met wide and steadily growing disfavor from legal scholarship and professional opinion* * *[and] was rejected by most of the courts before whom the matter came after that decision" (307 U.S. at 281; footnotes omitted). These observations by the Court, as well as the Court's basic analysis, show that the decision in *Woodrough* repudiated *Evans*' central premise that the Compensation Clause is "directed against all diminution, whether for one purpose or another * * * " (253 U.S. at 255) and serves to protect a judge's compensation "from diminution in any form" (*id.* at 263).[52]

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[52]The *Woodrough* opinion echoed Justice Holmes' dissent in *Evans* v. *Gore* that requiring "a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge" (253 U.S. at 265), and Justice Butler, in his dissent in *Woodrough*, recognized that the Court's decision "destroy[s] the decision in *Evans* v. *Gore*" (307 U.S. at 297) and "repudiates its earlier decisions" in *Evans* v. *Gore* and *Miles* v. *Graham* (307 U.S. at 299). Lower federal courts and commentators have also read *Woodrough* as disapproving the *Evans* holding. See, *e.g.*, *Atkins* v. *United States*, *supra*, 556 F.2d at 1043, 1044, 1045; *Magruder* v. *Brown*, 106 F.2d

In our view, *Woodrough* sets forth the governing principles under the Compensation Clause. Applying those principles here, it is evident that the Pay Acts did not violate the Constitution. There is no evidence whatever that the Acts were prompted by Congress' antagonism against the judiciary or its displeasure with any particular federal judges or judicial decisions, and appellees have not alleged that the Pay Acts constituted an attack on judicial independence or discriminated against federal judges. As fully discussed above (see pages 36–48, *supra*), the Pay Acts were based on important policy considerations extending far beyond the federal judiciary, and they did not, in either purpose or effect, "make[ ] inroads upon the independence of judges" (*O'Malley* v. *Woodrough*, *supra*, 307 U.S. at 282).[53] Similarly, the Pay Acts did not discriminate against federal judges, but rather were equally applicable to a broad range of ranking government officials, including the Vice President, Cabinet officers and

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428, 430, 431 (4th Cir. 1939), cert. denied, 308 U.S. 624 (1940); Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308, 332–333 n.94 (1976); 53 Harv. L. Rev. 137 (1939); 15 Ind. L.J. 159, 161 n.11 (1939); 13 S. Calif. L. Rev. 131, 132 (1939); cf. *Gunn* v. *Dallman*, 171 F.2d 36, 37 (7th Cir. 1948) (Minton, J.), cert. denied, 336 U.S. 937 (1949) (under *Woodrough*, independence of state judges is not impaired by requiring them to pay federal income taxes). And in *Baker* v. *Commissioner*, 149 F.2d 342, 344 (4th Cir.), cert. denied, 326 U.S. 746 (1945), the court stated that under *Woodrough* a judge could constitutionally be required to pay higher taxes as part of a general increase in the tax system, a conclusion that implicitly acknowledges that the *Evans* analysis was discredited by *Woodrough*.

[53] It is unnecessary in this case for the Court to decide whether both the purpose and the effect of undermining the independence of the judiciary are necessary to establish a violation of the Compensation Clause, since neither element is satisfied here. See *Atkins* v. *United States*, *supra*, 556 F.2d at 1054. In view of our reading of *O'Malley* v. *Woodrough*, we do not consider this issue to have been authoritatively answered by the decision in *Evans* v. *Gore*.

Executive Schedule personnel, and members of Congress. See *Duplantier* v. *United States*, 606 F.2d 654, 669 (5th Cir. 1979), petition for cert. pending on other grounds, No. 79-1180 (filed Jan. 31, 1980); *Atkins* v. *United States*, *supra*, 556 F.2d at 1055-1057. Just as federal judges "are also citizens" and thus subject to "the common duties of citizenship" (*O'Malley* v. *Woodrough*, *supra*, 307 U.S. at 282), so, too, are they high-ranking public officeholders who should not be exempted, by virtue of the Compensation Clause, from the responsibilities and obligations that Congress in the Pay Acts has imposed on all other leading government officials. In light of the purpose of the Compensation Clause and the decisions of this Court, we submit that the Constitution does not preclude Congress from including federal judges in such legitimate, nondiscriminatory legislation.

The district court sought to avoid this analysis by labeling the Pay Acts as "direct" rather than "indirect" diminutions in compensation (79-983 J.S. App. 16a; 79-1689 J.S. App. 8a). In the district court's view, direct diminutions are unconstitutional as such, without regard to considerations of discrimination or judicial independence.[54] We believe this approach to be unsound. As the

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[54] It is not entirely clear what is meant by the terms "direct" and "indirect" diminutions. At one point, appellees seem to suggest (79-983 Motion to Affirm 30-31 n.27) that an "indirect" diminution is one that affects the public generally, such as the income tax (*O'Malley* v. *Woodrough*) or inflation (*Atkins* v. *United States*). See also *id.* at 28 n.26, 32-33; 79-1689 Motion to Affirm 25 n.14, 28-29. At the same time, appellees also appear to suggest that an "indirect" diminution is one that does not deal with judges' salaries "as such" (79-983 Motion to Affirm 31 n.27). However, neither appellees nor the district court have ever explained the grounds on which the Pay Acts are deemed to be "direct" diminutions—that the statutes apply to high-ranking government officials but not to all government employees or to the general population as a whole; that Congress focused on salaries as the express object of the legislation; that Congress, at least in the 1977 and 1978

Court of Claims recognized in *Atkins* v. *United States*, *supra*, 556 F.2d at 1045, 1057:

> A tax or other alleged diminution does not contravene the Clause when it "makes [no] inroads upon the independence of judges * * * ." [*O'Malley* v. *Woodrough*,] 307 U.S. at 282, 59 S. Ct. at 840. * * * The key to the decisions in *Evans* and *Miles*, and to the overruling of those cases in *O'Malley*, was the Court's view of the scope of protection needed to maintain an independent judiciary. This will guide our decision as well. * * * [O]nly diminutions that are discriminatory and that attack judicial independence present grounds for relief under Article III.

In our view, the Court of Claims correctly discerned that the guiding principle in construing the Compensation Clause should be "the scope of protection needed to maintain an independent judiciary."

The court below ignored this principle. By excluding considerations of judicial independence, the court has departed from the settled purpose of the Compensation Clause and stripped the Clause from its historical moorings. As the Court of Claims cautioned in *Atkins* v. *United States*, *supra*, 556 F.2d at 1049, "a mere exegesis of words is not to be preferred to an interpretation of the Clause in light of its widely acknowledged purpose." Moreover, there is no basis to believe that "direct" diminutions necessarily pose a greater risk to the judiciary or that the Compensation Clause was intended to furnish

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Pay Acts, explicitly referred in part to judges or the judicial branch (79-983 J.S. App. 32a; 79-1689 J.S. App. 22a); that Congress acted in an affirmative fashion to affect judicial salaries; or for some other reason. We note this issue to illustrate the uncertainties inherent in appellees' position that would make it difficult in future cases to apply their attempted distinction between "direct" and "indirect" diminutions.

greater protection against such diminutions.[55] On the contrary, this Court has recognized that "indirect" as well as "direct" diminishments fall within the proscription of the Compensation Clause. See *Evans* v. *Gore*, *supra*, 253 U.S. at 248-249, 254. In our view, the same standard—which we suggest is set out in *Woodrough*—is applicable to "direct" and "indirect" diminutions.[56]

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[55] For example, it is not at all apparent that the Pay Acts challenged here as "direct" diminutions would necessarily represent a more serious threat to judicial independence than would Congress' deliberate and invidious refusal to raise judges' salaries in the face of continued inflation, which under appellees' analysis would be an "indirect" diminution. Similarly, imposition of a higher income tax rate for government officials who enjoy life tenure would raise serious problems under the Compensation Clause even though only an "indirect" diminution would be involved. By contrast, a nondiscriminatory reduction of all government salaries, including those of judges, during a time of severe deflation—although arguably "direct"—would clearly be without invidious purpose or effect and therefore should not, in light of the object and history of the Compensation Clause, be deemed unconstitutional. Thus, although a "direct" diminution might more readily give rise to an inference that a statute would serve, in purpose or effect, to impair the independence of Article III judges or discriminate against them, we see no reason either to presume that any such "direct" diminution would invariably present a more substantial danger to an independent judiciary than would an "indirect" diminution or to hinge the constitutional protection on such labels.

[56] The decisions in *O'Donoghue* v. *United States*, 289 U.S. 516 (1933), and *Booth* v. *United States*, 291 U.S. 339 (1934), do not lead to a different conclusion. In *O'Donoghue*, the Court held, on certificates from the Court of Claims, that the courts of the District of Columbia were established under Article III of the Constitution and thus that the judges of those courts were within the statutory provision exempting from pay reductions during the Depression all " 'judges whose compensation may not, under the Constitution, be diminished during their continuance in office.' " The Court in *O'Donoghue* expressly limited its decision to the question whether District of Columbia judges were appointed under Article III and thus expressly exempted by Congress from the statute (289 U.S. at 529); in particular, the Court did not decide whether, in the absence of the statutory exemption, Congress could constitutionally have applied the salary reductions to Article III judges. In *Booth*, upon which appellees heavily rely (79-983 Motion to Affirm 28-30; 79-1689 Motion to Affirm 25-27), the

Court held, as conceded by the Solicitor General, that a reduction after an increase in a judge's salary, even though not a reduction below the salary in effect at the time of the judge's appointment to the bench, is a reduction in compensation (291 U.S. at 352). We do not challenge that holding here. Hence, if the Pay Acts are otherwise unconstitutional, they cannot be saved simply because the salaries nevertheless remain above the levels that existed at the time the judges assumed office. However, *Booth* does not bear on the question whether the nondiscriminatory failure to pay cost-of-living increases violates the Compensation Clause. Moreover, both *O'Donoghue* and *Booth* were decided prior to this Court's decision in *O'Malley* v. *Woodrough*, *supra*.

Nor, contrary to the assertions of the district court (79-983 J.S. App. 15a-16a) and of appellees (79-983 Motion to Affirm 28 n.26, 31 n.27; 79-1689 Motion to Affirm 25 n.14), are the decisions below supported by *Atkins* v. *United States*, *supra*. In *Atkins*, the plaintiff judges alleged that Congress' failure to maintain their purchasing power by raising their salaries during a period of inflation constituted a violation of the Compensation Clause. The court dismissed this contention, holding that "[i]ndirect, nondiscriminatory diminishments of judicial compensation, those which do not amount to an assault upon the independence of the [judiciary] or any of its members, fall outside the protection of the Compensation Clause * * * (556 F.2d at 1045). See also *Duplantier* v. *United States*, 606 F.2d 654, 669 (5th Cir. 1979), petition for cert. pending on other grounds, No. 79-1180 (filed Jan. 31, 1980). However, the court in *Atkins* nowhere suggested that "direct" diminishments would be tested by a different, more exacting standard. Indeed, the *Atkins* opinion suggested quite the opposite view, for it noted that *O'Malley* v. *Woodrough* "had no disagreement with *Evans* and *Miles* insofar as they determined that indirect incursions upon judicial salaries, as much as direct ones, were not tolerable under the Compensation Clause" (556 F.2d at 1045). See also 556 F.2d at 1048-1049. And, as discussed above (see pages 66-67, *supra*), *Atkins* expressly recognized (556 F.2d at 1045, 1057) that "the scope of protection needed to maintain an independent judiciary" is the guiding principle under the Compensation Clause, "that a mere exegesis of words is not to be preferred to an interpretation of the Clause in light of its widely acknowledged purpose," that "[a] tax or other alleged diminution does not contravene the Clause when it 'makes [no] inroads upon the independence of judges * * *,'" and that "only diminutions that are discriminatory and that attack judicial independence present grounds for relief under Article III."

CONCLUSION

The judgments of the district court should be reversed.

Respectfully submitted.

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*The Solicitor General has disqualified himself in these cases.

APPENDIX

28 U.S.C. (and Supp. II) 455 provides:

Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, *Appellant*

v.

HUBERT L. WILL, ET AL., *Appellees*

UNITED STATES OF AMERICA, *Appellant*

v.

HUBERT L. WILL, ET AL., *Appellees*

ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLEES

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APPENDIX 1a

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Nos. 79-983 and 79-1689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, *Appellant*

v.

HUBERT L. WILL, ET AL., *Appellees*

UNITED STATES OF AMERICA, *Appellant*

v.

HUBERT L. WILL, *Appellees*

ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLEES

QUESTIONS PRESENTED

1. Whether provisions contained in the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 788 and Joint Resolution No. 412 (October 12, 1979), Pub. L. No. 96-86, 93 Stat. 656, which imposed temporary limitations on the use of appropriated funds for the payment of statutorily mandated cost-of-living salary adjustments, but which did not by their terms purport to repeal, modify or supersede any statute defining judicial salaries, including the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419, 28 U.S.C. § 461 ["Adjustment Act"], had the effect of temporarily superseding or amending any such statutes for fiscal years 1977, 1979 and 1980.

2. Whether the Act of July 12, 1977, Pub. L. No. 95-66, 91 Stat. 270, which provided that the salary adjustment next scheduled after enactment of that Act "shall not take effect" but which did not by its terms repeal, modify or suspend the Adjustment Act, caused the Adjustment Act to be temporarily repealed by implication for fiscal year 1978.

3. Whether the temporary limitation contained in the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, signed into law by the President on October 1, 1976, may constitutionally be applied retroactively to reduce judges' pay by withholding funds for cost-of-living salary adjustments that had become payable earlier that day.

4. Whether the temporary limitation on the use of appropriated funds contained in Joint Resolution 412, Pub. L. No. 96-86, 93 Stat. 656, adopted October 12, 1979, after the

cost-of-living salary adjustments had become payable on October 1, 1979, applies to the Judicial Branch.

5. Whether the temporary limitation on the use of funds contained in Joint Resolution 412, Pub. L. No. 96-86, 93 Stat. 656, adopted October 12, 1979, may constitutionally be applied retroactively to reduce judges' pay by withholding funds for cost-of-living adjustments that had become payable on October 1, 1979.

6. Assuming that any of the challenged enactments prevented an annual cost-of-living salary adjustment from taking effect, whether the right to cost-of-living salary adjustments prescribed in the Adjustment Act constitutes a portion of judges' "Compensation" within the meaning of the Compensation Clause, Article III, section 1.

7. Assuming that judges' compensation has been diminished, whether appellees must demonstrate that the diminution was part of a discriminatory attack upon Article III judges designed to undermine their independence in order for such a diminution to violate the Compensation Clause of Article III, section 1.

8. Whether appellant's position in these appeals, if sustained, would not totally undermine Article III, section 1 and nullify that constitutional provision as a means of ensuring judicial independence.*

STATEMENT

These cases are brought by fourteen judges of the United States Courts on their own behalf and on behalf of all federal judges serving under Article III of the Constitution.[1]

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* Throughout this brief, the following abbreviations will be used: JS—jurisdictional statement; JA App.—appendix to jurisdictional statement; JA—joint appendix; ASG—acting solicitor general.

[1] Rule 34(b) of the Rules of this Court requires that all parties to the proceedings below be identified. The parties below and in this Court are: Hubert L. Will, John R. Bartels, Henry Bramwell, Lloyd

With certain exceptions, the Statement of the case set out in the brief of the Acting Solicitor General ("ASG") on behalf of appellant contains an adequate description of the judicial pay system (ASG Bf. at 4-8). In the recitation of facts giving rise to the controversy regarding the actions of Congress in withholding the cost-of-living salary adjustments for the fiscal years 1977, 1978, 1979 and 1980, however, appellant's Statement is at times inaccurate and argumentative. Accordingly, appellees submit this supplemental Statement.

One example of the inaccurate or misleading nature of appellant's Statement is the repeated mischaracterization of the legislative enactments at issue in this appeal as "Pay Acts," implying that they are substantive enactments providing for judicial pay. None of the four enactments at issue set rates of judicial pay or appropriated funds for payment of judicial salaries, and three of the four are actually appropriations bills providing funds for other branches of the government.[2]

H. Burke, William J. Campbell, Fred J. Cassibry, Mark A. Costantino, Jack M. Gordon, George B. Harris, Irving Hill, Edward R. Neaher, Thomas Collier Platt, Jr., George C. Pratt and Spencer Williams.

In addition, counsel in these appeals have been retained by the Conference of Metropolitan District Chief Judges.

[2] The first statute, which appellant refers to as the "1976 Pay Act", was actually the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439. It had nothing to do with prescribing the "pay" of federal judges. The cost-of-living salary adjustment for fiscal 1977 was set by the President and was not disapproved by Congress. Judicial salaries were funded by a separate appropriations act for the Judiciary, Pub. L. No. 94-362, 90 Stat. 952.

The Act referred to by appellant as the "1977 Pay Act" (Pub. L. No. 95-66, 91 Stat. 270) provided only that the fiscal 1978 salary adjustment would not take effect. (*Cont.*)

The salary component of judicial compensation (for a district judge) is defined, in part, at 28 U.S.C. § 135 as follows:

> Each judge . . . shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title [*i.e.*, the Executive Salary Cost-of-Living Adjustment Act].

Similar provisions apply to the compensation of other Article III judges. See 28 U.S.C. §§ 5, 44(d), 213 and 252.[3]

The Act referred to by appellant as the "1978 Pay Act" was the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 788. As in fiscal 1977, the salary adjustment for that year was set by the President and was never disapproved by Congress. Judicial salaries were funded by a separate appropriations act for the Judiciary, Pub. L. No. 95-431, 92 Stat. 1021.

The Act referred to by appellant as the "1979 Pay Act" was Joint Resolution No. 412, Pub. L. No. 96-86, 93 Stat. 656, adopted to provide temporary funding for certain agencies whose prior appropriations had lapsed. Again, the salary adjustment for fiscal 1980 had been set by the President and was never disapproved by Congress. Judicial salaries were funded by a separate appropriations act for the Judiciary, Pub. L. No. 96-68, 93 Stat. 416.

[3] It should be noted that, prior to enactment of the Adjustment Act in 1975, 28 U.S.C. § 135 provided that "[e]ach judge of a district court of the United States shall receive a salary of [x]", where "x" was the actual dollar rate set under the Federal Salary Act of 1967. In 1975, 28 U.S.C. § 135 and similar provisions applying to the compensation of other Article III judges were amended to define the salary component of a judge's compensation as the combined base amount determined under the Salary Act *and* the adjustment provided under the Adjustment Act.

At page 6 of his brief, the ASG states that the "Federal Salary Act contains no provision for annual adjustments to the salaries of Federal judges . . .", suggesting that the right to an adjustment is not a component of judges' compensation. The contrary is clear; this was conceded below, where 28 U.S.C. § 135, including its reference to the annual adjustment, is cited as the "compensation which judges shall receive for their services". 79-983, Statement of Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings, at 3.

The Executive Salary Cost-of-Living Adjustment Act, adopted in 1975, 28 U.S.C. § 461 (79-983 J.S. App. 26a-27a) [hereinafter the "Adjustment Act"] provides that the salaries of certain federal employees, including judges, shall be adjusted annually in an amount measured by the average adjustment in General Schedule salaries as determined under the Federal Pay Comparability Act of 1970, 5 U.S.C. § 5305, *et seq.*[4] [hereinafter the "Comparability Act"]. These percentage adjustments are submitted to Congress by the President and, for judges, become payable without further action by Congress on October 1 of each year (the first day of the fiscal year), unless within 30 days of their submission either House of Congress adopts a resolution disapproving the President's report.

The first salary adjustment, in the amount of 5% for fiscal 1976 (commencing October 1, 1975) was paid. This marked the first adjustment in judicial salary levels in more than six years and established the salary of a district judge at $42,000. In each of the next four years, Congress has by various temporary enactments withheld funds necessary to pay the adjustments, although it has never adopted a resolution disapproving the President's report.

For fiscal year 1977 (commencing October 1, 1976), the annual rates of pay for General Schedule employees were increased by an average of 4.8%. The same adjustment applied by virtue of the Adjustment Act to Executive Schedule salaries, including those of federal judges. The annual salary of district judges was thereby established at $44,000, payable October 1, 1976.[5]

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[4] The General Schedule sets the salary rates of approximately 1,600,000 federal employees. There are approximately 5,400 Executive Schedule employees, including federal judges. Public Information Bulletin, United States Office of Personnel Management, August, 1980.

[5] Executive Order No. 11941, 3 C.F.R. 151 (1976 Comp.).

Later that same day, after the salary adjustments had become payable, the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, 1446 (79-983 J.S. App. 31a) [hereinafter the "1977 Appropriations Act"], was signed by the President. Among other things, the 1977 Appropriations Act imposed a temporary limitation on the use of funds available to pay the full salary of federal judges. Specifically, the Act provided that appropriated funds could not be used to pay salaries for certain positions, including judges, at a rate which exceeded the rate in effect on September 30, 1976, the last day of the previous fiscal year. For district court judges, this proviso is interpreted by appellant to have limited temporarily the salaries of district judges to $42,000, the amount applicable in the prior fiscal year. The effect and legality of this fiscal 1977 limitation in the 1977 Appropriations Act is the subject of Count I of Appeal No. 79-983, [hereinafter, "Will I"].

Effective July 12, 1977, Congress passed Pub. L. No. 95-66, 91 Stat. 270, providing in pertinent part that any adjustment in Executive Schedule salary levels, including judicial salaries, which ordinarily would go into effect on October 1, 1977, "shall not take effect." Because of this limitation, the adjustment of 7.2% which became payable for General Schedule employees in October, 1977, was withheld from judicial salaries. The legality of this fiscal 1978 limitation is the subject of Count II of Will I.[6]

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[6] Apart from the mischaracterization of the July 12, 1977 enactment as a "Pay Act", the brief of the ASG contains an additional inaccuracy in its explanation of the enactment. The brief states that the sole purpose of the 1977 enactment was to eliminate the expected October, 1977 [fiscal 1978] salary adjustment because the goals of comparability had been achieved through implementation of the Quadrennial Commission's recommendations. The ASG fails to note that the 1977 quadrennial increase to $54,500

On September 30, 1978, Congress passed the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 788 (79-1689 J.S. App. 21a-23a) [hereinafter the "1979 Appropriations Act"]. That appropriations measure contained a temporary proviso which restricted the use of funds to pay the fiscal 1979 adjustment (5.5%) and which was virtually identical to that contained in the 1977 Appropriations Act. (See Pub. L. No. 95-391, § 304(a)(1) at 79-1689 J.S. App. 21a-23a).

Although the legality of this appropriations limitation, as it pertained to salary payments to judges during fiscal 1979, is disputed, the Acting Solicitor General concedes that, in any event, the limitation was "temporary" and judges became entitled to this adjustment on October 1, 1979, at the latest. (ASG Bf. at 12; 40-41, n. 33). The validity of this fiscal 1979 limitation is challenged in Count I in Appeal No. 79-1689 [hereinafter, "Will II"].

On August 30, 1979, the President submitted to Congress an adjustment of approximately 7% to become effec-

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for district judges, which the ASG implies attained comparability, followed a Commission recommendation that an annual salary of $62,000 for district judges was necessary to achieve comparability. That Congress also did not believe comparability had been achieved is evident from comments of its leaders only one month later. See comments of Senators Baker and Byrd, 123 Cong. Rec. 7095 (1977). The adjustment in March of 1977 merely served to make up some of the ground which had been lost through Congress' failure during the previous eight years (with the single exception of a five percent adjustment in 1975) to adjust judicial salaries.

More important, the quadrennial adjustment of March 1, 1977, did not take account of the cost-of-living increases experienced in fiscal 1978 (October 1, 1977 through September 30, 1978) and these increases have never been offset as intended by the Adjustment Act. For these reasons, the ASG's implicit argument that payment of the fiscal 1978 adjustment would have been a "double" payment is without factual foundation.

tive October 1, 1979. Appellant also concedes that this salary adjustment went into effect on October 1, 1979. (ASG Bf. at 12; 79-1689, J.S. 6-7, 14, 19, n. 11.) Accordingly, on October 1, 1979, two events occurred. First, the "temporary" limitation imposed under the 1979 Appropriations Act, if ever valid as to judges, expired and the 5.5% increase became immediately payable. Second, the fiscal 1980 adjustment of approximately 7% became payable. The aggregate of the 1979 and 1980 salary adjustments resulted in a total salary adjustment of 12.9% over the rates actually being paid judges prior to October 1, 1979. (ASG Bf. at 12; 79-1689 J.S. 6, 7, 14, 19, n. 11).

On October 12, 1979, Congress adopted Pub. L. No. 96-86, 93 Stat. 656 (79-1689, J.S. App. 23a-26a), a Joint Resolution intended to provide appropriations for certain agencies, which included a proviso that, for the fiscal year 1980, "funds available for payment to executive employees which includes Members of Congress . . . who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or . . . official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year". (79-1689, J.S. App. 24a-25a). The Congress thus conceded that the affected employees "under existing law *are entitled* to approximately 12.9 percent increase in pay." (emphasis added). The validity of this fiscal 1980 limitation is the subject of Count II of Will II.

The Acting Solicitor General concedes that application of the proviso in Pub. L. No. 96-86 to judges results in a direct diminution of their legally established compensation. (ASG Bf. at 51, n. 43 and at 60).

In the court below, appellees contended that the limitations contained in the 1977 and 1979 Appropriations Acts,

the Act of July 12, 1977, and the October 12, 1979 Joint Resolution did not purport to have and did not have the effect of altering or amending the statutory salary of judges and did not amend or repeal the Adjustment Act. Accordingly, the adjustments of 4.8% (fiscal 1977), 7.2% (fiscal 1978), 5.5% (fiscal 1979) and 7% (fiscal 1980) became payable, but have not been paid. Appellees also contended that, if these limitations somehow prevented the compensation adjustments from taking effect, they were in violation of the Compensation Clause of Article III, section 1 and were therefore unconstitutional.

The district court granted summary judgment in favor of appellees on all counts of both complaints and entered judgments for appellees in both cases. The judgments require the payment of back pay to appellees and the classes involved in each count of both cases. The judgments also require adjustments of rates of judicial pay over rates presently being paid all federal judges to take into account the cost-of-living adjustments payable for fiscal years 1978, 1979 and 1980.[7]

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[7] The Judgment in Will II specifically directs that the salaries of plaintiffs and their class be computed without regard to the restriction contained in the appropriations bills. (79-1689, J.S. 11a-12a). The same result is necessary in 79-983, as the district court concluded that the purported limitations were invalid. (79-983 J.S. 1a-21a).

SUMMARY OF ARGUMENT

The Compensation Clause, Article III, section 1 of the Constitution, provides:

> The Judges, both of the supreme and inferior Courts shall hold their Offices during good Behavior and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

I.

These appeals are taken in cases brought by fourteen United States judges as class actions on behalf of all Article III judges. These actions were brought reluctantly, after long and careful consideration of the sensitive questions involved, and only after appellees concluded that there was no alternative if the independence, integrity, quality and equality of the Judiciary is to be preserved. By the nature of the actions, affirmance of the judgments of the district court will affect the salary levels of all Article III judges including the Justices of this Court. This circumstance raises the potential application of the provisions of 28 U.S.C. § 455 which provides for the disqualification of any judge who has a "financial interest in the subject matter in controversy." (ASG Bf. App. 1a-3a).

The parties agree, first, that the restraints imposed by § 455 are not jurisdictional in nature and, therefore, have no effect on the jurisdiction of this Court or the district court.

The parties also agree that, because every judge has an interest in the controversy, the "rule of necessity" permits any judge to sit notwithstanding any personal interest. Appellees have fully researched the issue, including the long and well-settled history of the rule of necessity and the

legislative history of 28 U.S.C. § 455. The rule has been involved in numerous cases in this Court and in State and lower federal courts, including cases dealing with judicial salaries. (See cases cited at pages 19-20 notes 12, 13, 14 and 15, *infra.*) Many of these cases were decided after the adoption of 28 U.S.C. § 455 or in the presence of disqualification statutes similar to § 455. After thorough research, appellees have found no case where a disqualification statute prevented the case from being heard and no authority which requires disqualification of the Justices of this Court from hearing these appeals.

II.

The principal non-constitutional ground for upholding appellees' right to pay adjustments is the fundamental principle of statutory construction and appropriations law that an appropriations act generally does *not* amend, repeal or rescind substantive law.

Appellees' rights here are established by the statutes defining judicial pay which incorporate the Adjustment Act and which have not been amended or repealed since 1975. Adjustments for judges under the applicable statutes go into effect October 1 of each year, following submission of the President's report to the Congress, unless either House adopts a resolution disapproving them. No such resolution has ever been passed.

The simple non-constitutional issue presented in these appeals, therefore, is whether restrictions on the use of appropriated funds adopted in each of the last four years somehow temporarily repealed the Adjustment Act and altered the rates of judges' compensation otherwise payable. Appellees submit that the restrictions merely temporarily withheld funds for the full payment of the salary of judges, without in any way altering the judges' legal entitlement to those full salaries.

In three of the four years here at issue (fiscal 1977, 1979 and 1980) the limitations are in appropriations bills providing funds for agencies other than the Judicial Branch. In the other year (fiscal 1978) the limitation was not contained in an appropriations act. When analyzed, however, the 1978 Act is also a limitation on the use of funds and not an attempt to repeal or supersede the Adjustment Act.

In these appeals, the ASG contends that by adoption of the funding limitations, there was in each year a "temporary" repeal of the Adjustment Act by implication. Appellees disagree. If Congress had intended to repeal or amend that Act, it would have said so, bearing in mind the repeated admonitions of this Court that "the intention of the Legislature to repeal must be clear and manifest", that "repeals by implication are not favored", and that the policy against repeals by implication applies with even greater force when the claim to repeal rests solely on an appropriations act. See discussion at pages 23, 29-35, *infra*.

Appellant's position that temporary repeals or suspensions were accomplished by implication in each year is refuted by: (1) the opinions of two Presidents who issued Executive Orders after the limitations provisions were adopted, showing judicial salaries at the adjusted rates and noting that only the absence of appropriated funds prevented their payment; (2) the opinion of Congress expressed in Pub. L. No. 96-86, which states that judges were "entitled" to a 12.9% adjustment and thus acknowledges that the fiscal 1979 limitation did not prevent the 5.5% salary adjustment from taking effect; (3) the opinion of the Acting Comptroller General who advised Congress, prior to adoption of the fiscal 1977 Appropriations Act, that the limitation would not "suspend or postpone" the adjustments under the Adjustment Act and was "not therefore a limitation on the rates of pay established thereunder"; (4) the opinion of the

Office of Personnel Management, which advised all federal agencies that the fiscal 1979 limitation was merely a restriction on the use of appropriated funds and that the lawful rates of pay were the *adjusted rates;* (5) the opinion of the Administrative Office of the United States Courts which advised judges, after the fiscal 1977 limitation had been adopted, that although funds were not available for payment, salaries had been adjusted; (6) the Rules of both the Senate and the House which generally prohibit the use of appropriations measures to amend prior statutes; (7) well-settled principles of statutory construction; and (8) the applicable legislative history. Appellant's position is also inconsistent with its admission that the appropriations limitations were "temporary" only and expired by their own terms at the end of each fiscal year.

In addition to the foregoing, there is a separate reason why the fiscal 1980 limitation did not retroactively withdraw the cost-of-living adjustments for judges. Joint Resolution 412, Pub. L. No. 96-86, 93 Stat. 656, purports only to limit funds "available for payment to *executive employees, which includes Members of Congress* who under existing law are entitled to approximately 12.9 percent increase in pay . . . ." (emphasis supplied). This Act does not purport to apply to the Judicial Branch, but is limited by its terms to executive employees and Members of Congress.

That judges' salaries could not be, and were not, included in this limitation is also clear from the repeated acknowledgments by members of both Houses that judicial salaries could not constitutionally be reduced or "rolled back."

For all of these reasons, the judgments of the district court in these cases may be affirmed on non-constitutional grounds.

III.

While appellees agree that there is a non-constitutional basis for affirming the judgments below, they urge that this Court determine, as did the district court, that the right to annual salary adjustments provided by statute is an integral part of judges' compensation which cannot constitutionally be withheld. In each of the years in question, Congress withheld a portion of the compensation to which judges were entitled. Whether this was accomplished by temporary funding limitations or by an implied amendment to statutes which established judges' salaries is immaterial from a constitutional standpoint. The refusal to pay was, in each instance, unconstitutional.

Congress has included the adjustment as part of a judge's compensation. 28 U.S.C. § 135 states that "Each Judge . . . shall receive a salary at an annual rate determined under . . . [the Federal Salary Act] as adjusted by . . . [the Executive Salary Cost-of-Living Adjustment Act]." Under this section, the salary of district judges is defined as including *both* a base compensation *and* an annual adjustment. Other statutory provisions define the salaries of other Article III judges in a like manner. See text at p. 4, n. 3, *supra*.

The court below correctly held that, although cost-of-living salary adjustments are not payable until October 1 of each year, the right to cost-of-living salary adjustments is a component of judges' compensation which may not be diminished or revoked. Therefore, the actions of Congress in refusing to appropriate funds for these adjustments, if effective, were in violation of the Compensation Clause. The decision in this regard is supported by numerous authorities including cases as early as 1803 and as recently as two cases decided by the Supreme Courts of Delaware and California in 1977 and 1980. Those courts, in applying analogous provisions in their own State constitutions, held that annual

cost-of-living adjustments provided for by statute were part of judicial compensation and could not be revoked by subsequent legislation. See discussion at pages 51-53 *infra*.

The writings of the founding fathers, the debates of the Constitutional Convention and a long list of authorities interpreting the Compensation Clause all uniformly support this proposition.

The ASG's position that this legislation did not diminish the compensation of Article III judges within the meaning of the Compensation Clause is based on two unsupportable contentions: (1) That a judge's right to an annual salary adjustment under the applicable statute is not a protected component of a judge's salary until it becomes payable on October 1 of each year; and (2) In those instances where the adjustment did become payable before enactment of the funding limitation[8], Congress may reduce compensation so long as the judges affected by the reduction cannot prove that Congress sought to discriminate against judges or attack their independence. Appellees submit that neither contention has merit. The right to an adjustment is a protected component of a judge's compensation. This is the conclusion of every authority which has considered the issue or any remotely similar issue.

As to the second contention, it has never been held by any court that proof of a discriminatory animus is necessary to

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[8] In two of the four years at issue the adjustments became payable before the funding limitation took effect. The 1980 adjusted salary was payable for 11 days before Congress adopted an appropriations limitation which purported to reduce judges' compensation. And, for fiscal 1977, the appropriations bill containing the limitation was not adopted and approved until October 1, 1976, after the adjusted rate had become payable earlier that day. Thus, for at least a number of hours on October 1, 1976, as appellant conceded below (see p. 43 n. 47 *infra*), judges were earning the adjusted salary.

render a direct diminution of a federal judge's compensation unconstitutional. On the contrary, the rule has always been that congressional action which reduces or withholds from a judge any portion of that to which he is entitled as compensation is, without more, unconstitutional.

This principle has been obvious to the Congress as well. During the Great Depression, numerous statutes were enacted which lowered federal employees' salaries. These enactments always included the proviso: "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." See discussion, at pp. 62-63, *infra*.

And the very statute here involved, the Adjustment Act (which requires that federal judges' salaries be adjusted in the same manner as the salaries of General Schedule employees), specifically exempts federal judges' salaries if General Schedule adjustments result in salary *reductions*. Congress would not have exempted judges from downward adjustments had it shared the views expressed here by appellant.

The contention of appellant, that a non-discriminatory diminution of judicial compensation is permissible, finds no support anywhere.

ARGUMENT

I. THE JUSTICES OF THIS COURT ARE NOT DISQUALIFIED IN THIS CASE

In its Order of February 19, 1980 (J.A. 56a) postponing the question of jurisdiction in Will I, the Court directed the parties "to address the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court" (J.A. 56a).[9]

Before doing so, certain vital points should be underscored. First, personal financial gain is not appellees' primary objective. These actions were brought most reluctantly by these jurist-litigants, and only after long and careful consideration of the dilemma of the Judiciary and the implications of such a suit. No one hoped more fervently than did appellees that application of the compensation formula mandated by the Federal Salary Act and the Adjustment Act would establish an equitable and independent basis for determining judicial compensation. Unhappily, because of the attempts of Congress to prevent that formula from being applied, that hope proved false. These actions were brought by appellees in furtherance of their obligation to preserve the independence, integrity, quality and equality of the judiciary envisioned by the drafters of the Constitution. As the Court stated in *O'Donoghue* v. *United States*, 289 U.S. 516, 533 (1933), "there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation." Further, this duty rests upon the federal judiciary not for the purpose of protecting the financial well being or "private advantage" of the individual judge, "but as a continuing

[9] 28 U.S.C. § 455 is set out in the Appendix to appellant's brief at App. 1a-3a.

guaranty of an independent judicial administration for the benefit of the whole people." *O'Donoghue* 289 U.S. at 533.

In this regard, references that appellees seek an increase in pay are inaccurate. Appellees seek only the compensation mandated by statute. And, as shown in the brief of the *amicus curiae,* Chicago Bar Association (at 15-16 and n. 6) these adjustments, (which were paid to over 98% of all federal employees), if paid to judges, would have failed even to maintain parity between judges' salary levels and increases in the cost-of-living. Indeed, if the judgments below are affirmed, a district judge serving since 1968 will still be receiving substantially less in "real dollars" than he or she received in 1968.

On the question of disqualification, appellees agree with appellant that "[t]he strictures imposed by the judicial disqualification statute, 28 U.S.C. § 455, are not jurisdictional in nature" and have no effect on the jurisdiction of the district court or of this Court to hear and decide these cases. (ASG Bf. at 24).

The parties are also in agreement that all Article III judges, including the members of this Court, have a financial interest in the outcome of this case, regardless of date of appointment and regardless of whether they are members of the classes involved in these appeals. (ASG Bf. at 25-26). If the judgments of the district court are affirmed, the salary levels of all federal judges will be adjusted in the same manner; as if the funding limitations contained in the appropriations measures in issue had never been adopted.[10]

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[10] For example, if the judgments of the district court are affirmed in these appeals, the salary of every district judge is $65,800. See Memorandum issued to Judges of the United States by the Administrative Office of the United State Courts, September 10, 1979 (Appendix 1a-3a) for all judges' salaries as adjusted.

This circumstance raises the potential application of the provisions of 28 U.S.C. § 455 which provides for the disqualification of any judge who has "a financial interest in the subject matter in controversy" or "is a party to the proceeding." 28 U.S.C. § 455(b)(4) and (5)(i); (ASG Bf. App. 1a.-3a.). However, because every federal judge has an interest in the controversy, the "rule of necessity" permits any judge to sit notwithstanding such personal interest. On this point the parties fully agree (see ASG Bf. at 24-31, and the Motion to Affirm filed in Appeal No. 1689 at 8-13). Appellees know of no authority to the contrary.

The rule of necessity is long established, having been traced back to at least 1430 and the Yearbooks. *Dimes* v. *Grand Junction Canal Co.*, 10 Eng. Rep. 301, 313 (1852). See, *The Independence of the Judiciary*, 34 Can. B. Rev. 769, 790 (1956). See also, Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609-11 (1947). Significantly, Professor Frank's opinions on disqualification are reflected in 28 U.S.C. § 455. See Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 L. & Contemp. Prob. 43, 44 (1970), where the author recognizes the rule as an integral part of any disqualification statute.[11]

The rule of necessity has been applied consistently by this Court[12] and by State[13] and lower federal[14] courts, includ-

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[11] The Senate and House Reports also refer to Professor Frank's testimony, S.Rep. 419, 93rd Cong., 1st Sess. (1973) at 3; H. Rep. 1453, 93rd Cong., 1st Sess. (1974) at 3.

[12] *Evans* v. *Gore*, 253 U.S. 245 (1920). See also, *Miles* v. *Graham*, 268 U.S. 501 (1925); *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939); and *North American Co.* v. *SEC*, 327 U.S. 686 (1946), discussed at ASG Bf. at 28, n. 17.

[13] *Olson* v. *Cory*, 609 P.2d 991 (Cal. 1980); *McCoy* v. *Handlin*, 153 N.W. 361 (S.D. 1915); *State ex rel. Gardner* v. *Holm*, 62 N.W.2d 52 (Minn. 1954); *Higer* v. *Hansen*, 170 P.2d 411 (Idaho

ing cases involving judicial salaries.[15] It has been applied since the enactment of § 455 and in the presence of disqualification statutes similar to § 455.

Appellant's brief carefully analyzes the legislative history of 28 U.S.C. § 455 and concludes that the statute is not intended to require disqualification in this case, a conclusion with which appellees fully agree. (Motion to Affirm filed in Appeal No. 79-1683 at 8-13). After exhaustive research, the Solicitor General, on behalf of the United States, reached the same conclusion in *Atkins* v. *United States,* (No. 75-1728, On Certificate From the United States Court of Claims). The plaintiffs in that case agreed. (See No. 75-1728, Brief on the Question of Disqualification). Subsequent research has uncovered no instance in which a disqualification provision prevented a case from being heard. Indeed, if such a result were intended, to that extent, § 455 would unconstitutionally foreclose access to the courts to a group of citizens.[16]

1946); *State ex rel. Mitchell* v. *Sage Stores Co.,* 143 P.2d 652 (Kan. 1943); *Gordy* v. *Dennis,* 5 A.2d 69 (Md. 1936).

[14] *Duplantier* v. *United States,* 606 F.2d 654, 662-63 (5th Cir. 1979) *cert. pending* No. 79-1180; *Atkins* v. *United States,* 556 F.2d 1028, 1039-1040 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978); *Pilla* v. *American Bar Ass'n,* 542 F.2d 56, 58-59 (8th Cir. 1976); *Foley* v. *Carter,* F.Supp. (D.D.C. 1980), appeal pending, Nos. 80-1548, 80-1551 (D.C. Cir. filed May 21, 1980). *United States* v. *Corrigan,* 401 F.Supp. 795 (D.Wyo. 1975).

[15] See, *Evans* v. *Gore, Miles* v. *Graham* and *O'Malley* v. *Woodrough,* note 12 *supra; Olson* v. *Cory, McCoy* v. *Handlin* and *State ex rel. Gardner* v. *Holm,* note 13 *supra;* and *Atkins* v. *United States,* note 14 *supra.*

[16] See Reddish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U.Pa. L. Rev. 45, 49 (1975). See also *Battagalia* v.

Appellees further submit that any suggestion that the disqualification statute was intended to overturn the rule of necessity and forever close the door to consideration of appellees' claims would suggest consequences which go well beyond this case. Suppose, for example, that Congress enacted a statute reducing the salary of every judge by one-half or shortening every federal judge's term to ten years. Such legislation would obviously be unconstitutional. Yet, if no judge could hear the case, the unconstitutional statute would survive without challenge, and the rights of the public, for whom the protections of Article III are intended, would be totally frustrated.

Accordingly, appellees respectfully submit that the district court and this Court have jurisdiction in these cases and the Justices of this Court are not disqualified from hearing and deciding these appeals.[17]

II. AS A MATTER OF STATUTORY CONSTRUCTION, THE CHALLENGED LIMITATIONS DID NOT AFFECT JUDGES' RIGHTS TO THE ANNUAL SALARY ADJUSTMENTS MANDATED BY THE STATUTES DEFINING JUDICIAL COMPENSATION.

Appellees agree with appellant that affirmance of the district court on statutory grounds would "obviate the need for the Court to consider the constitutional issues

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General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948), *cert. denied* 335 U.S. 887 (1948); *Crowell* v. *Benson*, 285 U.S. 22, 60 (1932); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 83 (1936) (Brandeis, J., concurring); *Brinkley* v. *Hassig*, 83 F.2d 351 (10th Cir. 1936).

[17] We do not read the rule of necessity as imposing a "duty to sit" in this case if an individual Justice feels personally compelled to disqualify himself. In that instance, the remaining Justices should decide the case.

presented."[18] (ASG Bf. at 32) Appellees submit, however, that the significance of the constitutional questions presented and the importance of resolving them and obviating any such future litigation mandates that resolution of these cases not be limited to affirmance of the district court on non-constitutional grounds.[19] Under these circumstances, appellees urge this Court to determine, as did the court below, that the right to an annual salary adjustment provided by statute is an integral part of a judge's salary protected by the Compensation Clause of Article III, section 1, and may not, therefore, be withheld.

A. None Of The Funding Limitations Rescinded Judges' Rights To The Annual Salary Adjustments

The principal non-constitutional ground for upholding appellees' rights to pay adjustments is the fundamental proposition that appropriations funding limitations relate solely to the use of appropriated funds and do not constitute amendments to or repeals of existing statutes. Applied here, the right to a salary adjustment set by statute remains unaffected and enforceable. These appeals thus present the non-constitutional issue: did the challenged provisions merely restrict the use of funds or did they somehow substantively amend, repeal or supersede the Adjustment Act.

Appellees submit that, notwithstanding the appropriations restrictions, judges' salary levels were adjusted on October 1 of each year and the right to full payment survived. Since appellees were paid less than the amounts to

[18] The converse is, of course, not true.

[19] Appellees are not unmindful of the well-established rule that constitutional questions should be avoided if a dispositive non-constitutional ground is available. *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 582 (1978). We submit, however, that the "special considerations in this case mandate" resolution of the constitutional issues as well. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 122 (1979).

which they were entitled by statute, they may recover the difference as a presently due and unpaid obligation of the United States payable out of funds appropriated for such claims reduced to judgment.

In resisting this contention, appellant does not claim that there was a specific repeal of the Adjustment Act in any year, but rather that the temporary funding limitations accomplished that purpose *by implication.* There is no authority to support this position.

The rule against repeals by implication—and that is precisely what the ASG contends occurred—has consistently been applied by this Court and by lower federal courts. See *Morton* v. *Mancari,* 417 U.S. 535 (1974); *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153 (1978); *United States* v. *United Continental Tuna Corp.,* 425 U.S. 164 (1976).[20] Moreover, as this Court noted in *Tennessee Valley Authority v. Hill,* this "cardinal rule" applies "with even greater force when the claimed repeal rests solely on an Appropriations Act." 437 U.S. at 190. The reason for this stems from the recognition that neither a limitation on the use of funds nor the appropriation of funds for a specified purpose has the effect of repealing or suspending an existing statute.

The funding limitations which appellant contends superseded judges' rights under the applicable pay statutes were, in three of the four years at issue (fiscal 1977, 1979 and

[20] Other cases applying the rule against repeals by implication include: *Kenai Peninsula Borough* v. *State of Alaska,* 612 F.2d 1210 (9th Cir. 1980); *Southern Capital Corp.* v. *Southern Pacific Co.,* 568 F.2d 590 (8th Cir. 1978); *United States* v. *John,* 560 F.2d 1202 (5th Cir. 1977); *Liberty Alliance of the Blind* v. *Califano,* 568 F.2d 333 (3rd Cir. 1977); *Gresham* v. *Chambers,* 501 F.2d 687 (2nd Cir. 1974); *Abell* v. *United States.* 518 F.2d 1369 (Ct. Cl. 1975); *Maynor* v. *Morton,* 510 F.2d 1254 (D.C. Cir. 1975); *West Virginia Division of The Izzak Walton League of America, Inc.* v. *Butz,* 522 F.2d 945 (4th Cir. 1975).

1980), "temporary" limitations contained in appropriations acts. The fiscal 1977 and 1979 Appropriations Acts provided funds for the *Legislative Branch*. The fiscal 1980 appropriations limitation was contained in Joint Resolution No. 412, Pub. L. No. 96-86, which provided continuing appropriations for fiscal 1980 to a number of *other federal agencies* whose prior appropriations had terminated with the close of the fiscal year, September 30, 1979. In all four years in question, funds for judicial salaries were provided under separate appropriations bills applicable to the Judicial Branch.[21]

The limitation on payment of the fiscal 1978 adjustment is found in a separate non-appropriations measure, Pub. L. No. 95-66, enacted July 12, 1977. Appellees submit that the unique circumstances reflected in the legislative history of this statute, combined with the well-established presumption against repeals by implication, lead to the conclusion that Pub. L. No. 95-66, like the appropriations acts, merely withheld the payment of salary adjustments, and did not amend or repeal the Adjustment Act. See discussion at 39-40 *infra*.

Fiscal 1977. The 4.8% adjustment for fiscal 1977 was not disapproved by Congress (5 U.S.C. § 5305(2)(e)) and went into effect on October 1, 1976. The annual salary of a district judge was thereby established at $44,000.[22] Later that same

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[21] Appropriations for the Judicial Branch were provided under Pub. L. No. 94-362, approved July 14, 1976 for fiscal 1977; by Pub. L. No. 95-86, approved August 2, 1977 for fiscal 1978; by Pub. L. No. 94-341, approved October 10, 1978 for fiscal 1979; and by Pub. L. No. 96-68, approved September 24, 1979 for fiscal 1980.

[22] In the District Court, appellant acknowledged the validity of the argument that "at least for a few hours" judges were earning adjusted amounts, *i.e.*, $44,000 for district judge. (See p. 43, n. 47, *infra*).

day, the President signed into law the 1977 Appropriations Act which prohibited the use of funds to pay the adjustment to certain officials, including judges.

Fiscal 1979. Similarly, Congress did not disapprove the salary adjustment of 5.5% for fiscal 1979. However, on September 30, 1978, the 1979 Appropriations Act was approved, providing that no appropriation could be used to pay that adjustment to the same small group of federal officials, including judges. The ASG concedes that both the fiscal 1977 and fiscal 1979 limitations were "temporary" only and [if ever valid] expired at the close of those fiscal years. With respect to fiscal 1979, appellant concedes that judges became entitled to this adjustment effective October 1, 1979, (the first day of fiscal 1980) at the latest. (ASG Bf. at 12.)

Fiscal 1980. On August 30, 1979, the President submitted to Congress an adjustment of approximately 7% to become payable October 1, 1979. Appellant concedes that this adjustment was payable on October 1, 1979. (ASG Bf. at 12). The aggregate of the 1979 and 1980 adjustments resulted in a total salary adjustment commencing October 1, 1979 of 12.9% over the rates at which judges were being paid prior to October 1, 1979. Then, on October 12, 1979, Congress adopted Pub. L. No. 96-86, a Joint Resolution intended to provide appropriations for certain agencies other than the Judicial Branch, which included a proviso that, for the year 1980, "funds available for payment to executive employees, which includes Members of Congress *who under existing law are entitled to approximately 12.9 percent increase in pay,* shall not be used to pay any such employee or . . . official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year." (79-1689, J.S. App. 23a-26a) (emphasis supplied).

With respect to each of the years in question, appellees submit that the limitations merely restricted the use of funds for the full payment of the lawful salaries of judges, without altering their entitlement to those salaries. The ASG maintains that each of these limitations on the use of funds somehow resulted in a substantive amendment or temporary repeal of a general statute—the Adjustment Act—preventing its operation in each of the years in question. Thus, the ASG contends that appellees' salary levels were *not adjusted* in any of the years in question as required by the applicable statutes, and that accordingly judges have been paid the full amount to which they were statutorily entitled. The position of appellant in this regard is at odds with the views of an impressive array of authoritative opinions:

1. *Appellant's position is contrary to the opinions of two Presidents.* Simultaneous with the signing of the 1977 Appropriations Act containing the restriction on the use of current appropriations, President Ford issued Executive Order No. 11941 reflecting judicial salaries *as adjusted.* Similarly, in October, 1978, President Carter, in issuing Executive Order No. 12087 pertaining to the fiscal 1979 adjustments, officially advised that judicial salaries were adjusted to stated levels under the provisions of the Adjustment Act.[23] Both Executive Orders bear the notation that, because of the limitations imposed under the referenced appropriations acts, "funds are not available to pay" salaries at the adjusted rates.

2. *Appellant's position is contrary to the opinion of Congress itself.* In adopting Pub. L. No. 96-86 for fiscal 1980, Congress acknowledged that the limitation in the 1979 Appropriations Act, Pub. L. No. 95-391, had not prevented the

[23] *Fiscal 1977:* Exec. Order 11941, 3 CFR § 151 (1976 Comp.); see Schedule 7.

Fiscal 1979: Exec. Order 12087, 3 C.F.R. § 234 (1978 Comp.); see Schedule 7.

adjustment. The 5.5% adjustment effective October 1, 1978, was part of the "12.9 percent increase in pay" to which Congress acknowledged judges were "entitled". By its explicit recognition that judges were "entitled" to the previous year's adjustment, Congress clearly declared that the fiscal 1979 limitation related only to the use of funds and did not prevent the adjustment in salary levels. The same rationale applies to the other years in question. See, ASG Bf. at 40-41, n. 33.

3. *Appellant's position is contrary to the opinion of the Comptroller General of the United States.* In interpreting the limitation contained in the 1977 Appropriations Act, the Acting Comptroller General declared:

> The language [of the Act] does not suspend or postpone the operation of Public Law 94-82 [the Adjustment Act] and *is not therefore a limitation on the rates of pay established thereunder.* The language sets a limitation on the use of funds. By its terms it restricts the use of funds otherwise available . . . . (J.A. 23a) (emphasis supplied).

4. *Appellant's position is contrary to the opinion of the Office of Personnel Management.* Through OPM letter 531-54, dated October 12, 1979, OPM determined that Section 304 of Pub. L. No. 95-391 [the 1979 Appropriations Act] was merely a "restriction on the use of appropriated funds to pay increases in pay to certain federal officers . . . ." The OPM letter concluded that the lawful rates of pay were the adjusted rates; they became payable on October 1, 1979, after the temporary restriction on the use of funds contained in § 304 "expired."

5. *Appellant's position is contrary to the opinion of the Administrative Office of the United States Courts.* In a Bulletin[24] issued less than two weeks after the passage of

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[24] Bulletin No. 492, Supplement No. 24, issued Ocober 11, 1976; J.A.18a-19a.

the 1977 Appropriations Act, the Administrative Office advised all judges that, pursuant to the provisions of the Adjustment Act, judicial salaries *were adjusted.* It further advised that, because of the restrictions in the 1977 Appropriations Act, funds were not available to pay salaries at the adjusted rates.

6. *Appellant's position is contrary to the Rules of both the Senate and the House of Representatives.* As this Court recognized in *Tennessee Valley Authority* v. *Hill, supra,* 437 U.S. at 190, both the Senate and the House of Representatives have rules against the use of appropriations measures to amend general statutes.[25] Each of the appropriations bills which contained an appropriations limitation here at issue also contained numerous other provisions, some of which were challenged under Senate and House Rules as constituting attempts to enact "general legislation" through appropriations bills.[26] No member of Congress claimed that the funding limitations here involved were amendments to 28 USC § 135, the Adjustment Act or any other general statute.[27]

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[25] See also, *Environmental Defense Fund, Inc.* v. *Froehlke,* 473 F.2d 346, 355 (8th Cir. 1972).

[26] See comments of Senator Stevens, 122 Cong. Rec. 29348-29366; Senator Wirth, 122 Cong. Rec. 28865; Representative Addabbo, 122 Cong. Rec. 31892; and Representative Riegle, 122 Cong. Rec. 31896.

[27] The ASG incorrectly suggests that Representative Wirth considered the fiscal 1977 limitation to be substantive legislation. On the contrary, Mr. Wirth specifically advised that appropriations measures should concern "the level of funds to be spent" and should not "go beyond these basic funding decisions. . . ." His comments did not concern the appropriations limitation in issue, but related instead to other amendments to the appropriations bills that concerned more than simply the "level of funds to be spent." 122 Cong. Rec. 28865.

Significantly, House Rule XIII (Clause 3) provides:

> Whenever a committee reports a bill or a Joint Resolution repealing or amending any statute or a part thereof it shall include in its report or in the accompanying document (1) the text of the statute or part thereof which is proposed to be repealed. . . .

The Reports issued by the House Appropriations Committee in compliance with this rule do not refer to the limitations as amending or repealing existing statutes.

In its Report on the 1979 Appropriations Act, the Committee (in a subsection identified in bold blocked letters as "COMPLIANCE WITH RULE XIII—CLAUSE 3") unequivocally states: "there are no instances in the bill where statutes or parts thereof are repealed or amended."[28] The Committee's Report for Joint Resolution 412 (fiscal 1980)[29] (in an equally prominent subsection) lists three provisions in that Resolution that were understood to amend or repeal all or a part of other statutes. There is no reference to any statute dealing with judges' pay or any limitation thereon.[30]

7. *Appellant's position is contrary to well-established principles of appropriations law and rules of statutory construction.* As previously noted, it has long been accepted

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[28] H. Rep. 1254, 95th Cong., 2nd sess. at 39 (1978).

[29] H. Rep. 500, 96th Cong., 1st sess. (1979).

[30] The ASG points to the fact that each of these limitations was listed in the respective Reports under the sub-heading "Changes In The Application Of Existing Law" (ASG Bf. at 44 and 46). This fact is not surprising; the restrictions at issue obviously constitute changes in the "application" of existing law to the extent that they represented a refusal to permit appropriated funds to be used for payment of an obligation created under another statute. But the House Committee on Appropriations clearly stated that the funding limitations did not repeal or amend any statute, including the Adjustment Act, and it is misleading for the ASG to imply otherwise, without even mentioning the Reports' references to Rule XIII. The reports could not be more explicit on this point.

that appropriations measures will not be viewed as having amended a general statute, in the absence of the clearest expression of congressional purpose and intent. *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 783 (D.C. Cir. 1971).[31]

In Gibney v. *United States*, 114 Ct. Cl. 38 (1949), an Immigration Inspector sued under a law authorizing overtime pay. Defendant argued that a 1948 appropriations act, which contained a proviso that none of the funds appropriated for the Immigration and Naturalization Service could be used to pay compensation for overtime services, had repealed plaintiff's right to this compensation. The *Gibney* court disagreed:

> [A] pure limitation in an appropriation bill does not have the effect of either repealing *or even suspending an existing statutory obligation* any more than the failure to pay a note in the year in which it was due would cancel the obligation stipulated in the note. . . . 114 Ct. Cl. at 50 (emphasis supplied).

The same result was reached in *Lovett* v. *United States*, 66 F.Supp. 142 (Ct. Cl. 1945);[32] *Andrew Geddes* v. *United*

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[31] Defendant's reliance upon *City of Los Angeles* v. *Adams*, 556 F.2d 40 (D.C. Cir. 1977), is misplaced. In *Adams*, neither plaintiff nor defendant contended that the right to reimbursement for expenditures made in one year, although limited by the amount of that year's appropriations, would become payable in subsequent years. In the instant case, however, it is conceded, for example, that the fiscal 1979 adjustment of 5.5% became payable, at the latest, on October 1, 1979, when the appropriations limitation expired.

[32] That case held that the effect of a proviso limiting the use of funds to pay certain federal employees for services performed after a specified date was merely to withhold payment and not to extinguish the obligation.

States, 38 Ct. Cl. 428 (1903);[33] and *United States* v. *Langston*, 118 U.S. 389 (1886), where the Court held there was nothing in the language of three appropriations acts which could be construed as repealing the express language of the statute fixing $7,500 as plaintiff's salary. Accordingly, the Court held that the appropriations acts did not repeal or amend the salary statute and that plaintiff's judgment constituted a valid claim against the United States, payable out of funds to be appropriated for such claims.[34]

United States v. *Dickerson*, 310 U.S. 554 (1940), relied upon by appellant, demonstrates the kind of legislative history that is required before a court will entertain a claim that an appropriations bill has suspended the operation of another statute. In *Dickerson*, the plaintiff sought to recover the amount of a reenlistment bonus claimed to be due under a 1922 statute, which had remained in effect until the enactment of § 18 of the Economy Act of March 3, 1933. The latter statute, which was *not* an appropriations measure, explicitly provided that the 1922 Act, to the extent it allowed for payment of reenlistment bonuses, "is hereby suspended as to reenlistments made during the fiscal year ending June 30, 1934." Identical legislation was enacted in each of the fiscal years 1935, 1936 and 1937. Then in 1938 and 1939, annual appropriations bills specifically referred to the 1922 statute and barred reenlistment allowances "notwithstanding the applicable provisions of §§ 9 and 10 of the [1922] Act." The legislative history of the 1938 and

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[33] "Neither is a public officer's right to his legal salary dependent upon an appropriation to pay it . . . the real question before the Court is that of the claimants' legal right to receive the pay . . . ." 38 Ct. Cl. at 444. *Accord, Byron Brown Ralston* v. *United States*, 91 Ct. Cl. 91 (1940) *cert. denied*, 311 U.S. 687 (1940).

[34] The *Langston* decision was discussed favorably in *Belknap* v. *United States*, 150 U.S. 588, 594 (1893), a decision relied upon by appellant.

1939 appropriations measures made it clear that they were meant to continue the "suspension of the reenlistment gratuity for enlisted personnel. . . ." 310 U.S. at 557.

In the instant case, it is conceded that the limitations were "temporary" only, expiring at the end of each fiscal year. (ASG Bf. at 41, n. 33). For example, if the Adjustment Act had been "suspended", the October 1, 1978 adjustment of 5.5% would have never taken effect. But as has been recognized by everyone, including appellant, the fiscal 1979 adjustment was not only in effect but was payable, at the latest, on October 1, 1979.

Two lower court cases relied upon by the ASG deserve separate attention in light of this Court's recent decisions in *Harris* v. *McRae,* No. 79-1268, and *Williams* v. *Zbaraz,* Nos. 79-4, 79-5 and 79-491. (Opinions Announced June 30, 1980). In support of the claim that the challenged appropriations measures constituted substantive amendments to the Adjustment Act, the ASG cites *Preterm, Inc.* v. *Dukakis,* 591 F.2d 121, 133-134 (1st Cir. 1979), *cert. denied,* 441 U.S. 952 (1979) and *Zbaraz* v. *Quern,* 596 F.2d 196, 200-202 (7th Cir. 1979).

Both *Preterm and Zbaraz* considered whether the "Hyde Amendment" to the Department of Health, Education and Welfare appropriations bill (prohibiting use of federal funds for abortions, except under limited circumstances) substantively amended Title XIX of the Social Security Act, 79 Stat. 443, as amended, 42 U.S.C. § 1396, *et. seq.* (1976 ed. and Supp. II). Both courts believed that if it did not, participating States would be obliged to fund entirely all medically necessary abortions for which federal funds were withheld under the Hyde Amendment. After examining the legislative history, both courts concluded that a substantive change in Title XIX was

affected by the Hyde Amendment. When the same question was presented to this Court in *Harris* v. *McRae,* and *Williams* v. *Zbaraz,* however, this Court disagreed even with the need to amend Title XIX, and found that Title XIX was never intended to impose a unilateral funding obligation upon participating States for any health service.

Since it was unnecessary to amend Title XIX, it follows that the courts of appeals decisions relied upon by the ASG were incorrect in holding that the appropriations limitation (the Hyde Amendment) either amended or was "intended" to amend the general statute (Title XIX of the Social Security Act).

The force of the rules proscribing substantive enactments within appropriations measures and disfavoring repeals by implication are demonstrated by *Tennessee Valley Authority* v. *Hill, supra.* There, annual appropriations for construction of the Tellico Dam were held not to have caused a substantive change in the applicable provisions of the Endangered Species Act of 1973, 16 U.S.C. § 1531. The project in question, which was virtually completed by the time suit was filed, had been commenced seven years *prior* to the passage of the Endangered Species Act; funds had been appropriated for its construction in each of the years after passage of the Act, including an appropriation passed after the court of appeals had held that the provisions of the Endangered Species Act precluded completion and operation of the dam.

In holding that the provisions of the Endangered Species Act controlled, this Court found that "[t]here is nothing in the appropriations measures, as passed, which states that the Tellico project was to be completed irrespective of the requirements of the Endangered Species Act". 437 U.S. at 189. The Opinion emphasizes the "cardinal rule"

that repeals by implication are not favored and stresses that this rule "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act."[35] *Id.*

The strength of the *Hill* decision is highlighted by appellant's effort to distinguish it. (ASG Bf. at 34, n. 25). The first difference claimed by appellant is that the Adjustment Act establishes "governmental obligations" which are enforceable in court; accordingly, appellant contends that the Adjustment Act must have been amended, for it is not "plausible" that Congress would refuse to appropriate funds and yet leave the obligation outstanding. The obvious answer to this bootstrap argument is that appellant's idea of "implausibility" has not been shared by the Legislative Branch in the past, for Congress did precisely what the ASG claims is not "plausible" in *Gibney* v. *United States, supra, Lovett* v. *United States, supra; Andrew Geddes* v. *United States, supra; United States* v. *Langston; supra,* and numerous other instances.

Appellant further attempts to distinguish *Hill* on the ground that the instant case "does not truly involve a repeal by implication, because there is at best a minor distinction between substantive and appropriations legislation in the context of expenditures for federal salaries." (*Id.*) Yet, this so-called "minor distinction" did not prevent plaintiffs Gibney, Lovett, Geddes and Langston, all federal employees, from recovering their compensation after a refusal to appropriate funds. In essence, the ASG contends (without support) that the right to a salary is contingent upon Congress' willingness to appropriate necessary

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[35] Notwithstanding appellant's intimation to the contrary, there is no question that Congress was well aware of the relationship between the Endangered Species Act and completion of the Tellico Dam at the time funds were appropriated for its completion. See H. Rep. 379, 95th Cong., 1st Sess. (1977).

funds to pay it. The Congressional Research Service recently concluded to the contrary and stated that there exists "no precedent for a contention that the entitlement to compensation of judges which cannot be reduced arises only with the enactment of an appropriations bill." CRS at 24.[36]

8. *Contrary to appellant's contention, the legislative history does not reflect a clear and manifest intent to amend, repeal or supersede the Adjustment Act.* Against this overwhelming authority, the ASG urges the Court to find a "congressional intent" to amend or repeal the Adjustment Act in each of the years in question, arguing that the legislative history is clear and unambiguous[37] in this respect, and that a contrary construction "merely to withhold funding for salary adjustments would defeat the very objectives expressly advanced by Congress in support of the statute." (ASG Bf. at 35).[38] While it is not appellees' burden to

[36] The Library of Congress, Congressional Research Service, Killian, J., *Diminution of Judicial Salaries—A Consideration Of The Constitutional Issue Raised By The Action Of Congress With Respect To Judicial Salaries.* (November, 1979) reprinted at 125 Cong. Rec. 16706 (November 15, 1979) [hereinafter cited as *"Diminution of Judicial Salaries"* or "CRS"].

[37] Throughout its brief, appellant points to statements made during the debates characterizing the refusal to appropriate funds as a means to "delay", "block", "limit", "withhold" or "freeze" salaries. Indeed, the term "freeze" is quoted in appellant's brief no less than 20 times in connection with the three appropriations measures. These terms are not precise, unequivocal or definitive. In fact, they would appear more properly to describe a temporary restriction on the use of funds rather than a substantive amendment, modification or repeal of an existing statute.

[38] With respect to the "very objectives expressly advanced by Congress", it should be noted that the principal concern expressed during the debates is not even discussed by the ASG—i.e., the adverse political consequences feared by Members of Congress each

establish that the appropriations measures here involved were *not* intended to modify the Adjustment Act—that is presumed to be the case—the extent to which the ASG's presentation misconstrues the legislative history proves the wisdom of the well-established presumption against amendments or repeals by implication.[39]

Even those who favored the limitations understood that the Adjustment Act was not thereby being repealed.[40] In this regard, the remarks of Senator Hollings, whose views are cited by the ASG, reflect this clearly. In addition to stating his understanding that the 1977 appropriations restriction was merely a limitation on the use of funds, 122 Cong. Rec. 15341, Senator Hollings adopted and caused to

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time the congressional pay issue is presented. See, comments of Representatives Shipley, Armstrong and Graffley with respect to the Shipley amendment (fiscal 1977) at 122 Cong. Rec. 28872-28873; comments of Representatives Harris, VanderVeen and Spellman at 122 Cong. Rec. 28879-28880; comments of Senator Taft, 122 Cong. Rec. 29132, Senator Hollings, *Id.* at 29133, Senator Stevens, *Id.* at 29165, Senator Stennis, *Id.* at 29180, and Senator Muskie, *Id.* at 29171.

[39] In a number of instances throughout its brief, appellant has seen fit to delete from quoted materials, words, phrases and, in some instances, sentences which would reduce the strength of appellant's arguments. See, for example, ASG Bf. at 37-38, n. 29, where the ASG selectively deletes express references to legislators (*e.g.*, "Members of Congress", "Members", etc.) which show opposition to automatic salary adjustments for *themselves*. This practice is evident throughout appellant's brief and tends to present a less than accurate view of what was actually said or not said on a given occasion.

[40] Remarks of Representative Grassley, 122 Cong. Rec. 28873; Senator Helms acknowledged that "this bill is not as satisfactory as an outright repeal of the Act which allows the automatic salary increases." 122 Cong. Rec. 29171. Moreover, other bills were then pending which would have substantively repealed the Adjustment Act (Rep. Grassley, 122 Cong. Rec. 28873; Rep. Harris, 122 Cong. Rec. 28879).

be published in the Congressional Record the views of Acting Comptroller General Keller:

> The language [limiting the use of funds] does not suspend or postpone the operation of Public Law 94-82 and it is not therefore a limitation on the rates of pay established thereunder. The language sets a limitation on the *use of funds.*
>
> Since Executive Schedule positions are specified in section 225(f), individuals in those positions could not *receive* the pay increase. *But the legal rates for Executive Schedule offices and positions would still be the rate set by the President* . . . . 122 Cong. Rec. 31860-31861, J.A. 23a. (emphasis supplied).

Similarly, with respect to the fiscal 1979 salary adjustment, the legislative history shows no congressional intent to amend or repeal the Adjustment Act. As previously noted, even appellant agrees that this adjustment took effect, at the latest, after the close of the 1979 fiscal year. Thus, the restriction did not "supersede" the operation of the Adjustment Act as appellant inconsistently maintains.[41]

With respect to fiscal 1980 (Joint Resolution 412), it is difficult to understand any basis for appellant's argument that the "legislative history [of the Joint Resolution] . . .

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[41] The ASG notes (ASG Bf. at 44-45, n. 36) that the 1979 Appropriations Act provided that, where the amount of any employee deduction or contribution is determined "on the basis of a rate of salary or basic pay, the rate of salary or basic pay *payable* . . . shall be treated as the rate of salary or basic pay [for purposes of computing such deduction or contribution]. (emphasis supplied). This does not confirm, as the ASG claims, that the fiscal 1979 restriction was a substantive enactment. It shows quite the opposite. If the limitation for fiscal 1979 had prevented the adjustment from taking effect, as the ASG claims, the proviso would have been wholly unnecessary; there would have been no difference between the amount payable and the lawful rate of pay.

confirms that the legislation constituted a substantive enactment." (ASG Bf. at 46). Representative Whitten, Chairman of the House Committee on Appropriations, noted that the resolution did not grant a 5.5% "salary raise" since the "law provides for definite increases . . . . The estimate is that the law provides now for a 12.9% increase in pay." 125 Cong. Rec. H8134.[42]

Moreover, the October 12, 1979 Resolution contained the proviso that if any employee accepted the 5.5%, that acceptance would be "in lieu of the 12.9% due for such fiscal year." The record shows that the Resolution's sponsors viewed this proviso as a means of establishing a settlement and compromise of otherwise valid claims for 12.9% by employees who accepted the 5.5% salary adjustment.[43]

Thus, contrary to appellant's contention, the legislative history does not disclose a clear and manifest intent to amend or repeal the Adjustment Act or any other statute. And, significantly, the applicable House Committee Reports do not list the pay limitations among the provisions which amended or repealed all or part of any other statute.[44]

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[42] See also the remarks of Representative Whitten at 125 Cong. Rec. H8135, H8457 and those of Representative Latta at 125 Cong. Rec. H8850.

[43] See remarks of Representatives Whitten, Hanley and Barnes at 125 Cong. Rec. H8446, H8448 and H8451, respectively. Similarly, Senator Stevens noted that "we have a pay adjustment of 12.9%. . . . [W]e have judges getting 12.9% for the rest of their lives. There is nothing we can do about that." 125 Cong. Rec. S14486. See also the remarks of Senator Magnuson at 125 Cong. Rec. S14483 and S14490.

[44] Appellant also argues that the circumstances surrounding passage of the Joint Resolution were "highly unusual" and "unprecedented" and that "Congress was unable to pass the Pay Act before the salary increases for fiscal year 1980 had become effective." (ASG Bf. at 36, n. 27). This contention is not supported by the

Fiscal 1978. As previously noted, the restriction on payment of the fiscal 1978 salary adjustment was not contained in an appropriations measure, as such. Pub. L. No. 95-66 simply provided that the next adjustment after passage of that statute on July 11, 1977, "shall not take effect." It is submitted that this Act, like the three appropriations measures, did not supersede the Adjustment Act, but merely withheld payment of the statutorily mandated salary adjustment.

The record leaves no doubt of the symbiotic relationship between S. 964 [which later became Pub. L. No. 95-66] and a proposed amendment to the Legislative Branch Appropriation Act of 1978. The former was debated and passed by the House on June 28, 1977, one day prior to House consideration of a proposed amendment to "roll back" *congressional* salary increases which had been granted a few months earlier pursuant to the Federal Salary Act.[45] Under these circumstances (particularly when read against the history of the Adjustment Act and the well-established presumption against repeals by implication), it cannot be presumed that Congress intended to repeal the Adjustment Act. Had it so intended, it would have done so by clear and unequivocal language specifically repealing that Act. In-

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record and is, in fact, absurd. There is no reason why Congress could not have enacted a separate statute prior to October 1, *explicitly* repealing the fiscal 1980 adjustment, though, had it done so, appellees' constitutional argument would still remain.

[45] See remarks of Representatives Salarz, Whalen and Rousselot. 123 Cong. Rec. 21121-21123. This proposed "roll-back" amendment is also significant to other issues on appeal. It excluded federal judges, and demonstrated Congress' understanding of the limits which Article III, section 1 imposes on its power to regulate judicial salaries. See remarks of Representatives Bolling, Bauman and Anderson, 123 Cong. Rec. 21362, and Representative Udall, 123 Cong. Rec. 21387.

deed, repealing legislation was pending in Congress at the time Pub. L. No. 95-66 was enacted.[46]

The ASG argues that, unlike the appropriations measures at issue in the remaining three years, "the 1977 Act [Pub. L. No. 95-66] was not an appropriations measure at all, but rather a substantive enactment that provided that the cost-of-living increases contemplated for October 1977, including increases under 28 U.S.C. 461 for Article III judges, 'shall not take effect' . . . ." (ASG Bf. at 41).

While appellees believe that Pub. L. No. 95-66 should be viewed solely as a temporary withholding of the fiscal 1978 salary adjustment, the distinction suggested by the ASG between that statute and the restrictions contained in the appropriations measures applicable to fiscal 1977, 1979 and 1980, represents a significant concession regarding the latter three measures. In effect, the ASG is saying that the difference between Pub. L. No. 95-66 and the other three enactments is that the former statute constitutes a substantive change—an amendment or repeal of the applicable provisions of the Adjustment Act for the 1978 fiscal year. By inference then, the others do not. If that is appellant's view of what differentiates Pub. L. No. 95-66 from the appropriations measures, it follows that, on non-constitutional grounds, appellees are summarily entitled to the relief sought in the first count of Will I and in both counts of Will II, even under the ASG's statutory analysis.

In short, the position maintained by appellant with respect to the claimed substantive nature of the challenged provisions is contradicted by their legislative history, is contrary to the views expressed by two Presidents, government agencies and the Congress, and is inconsistent with some of the

[46] See, remarks of Representative Ammerman at 123 Cong. Rec. 21125.

views expressed by appellant itself in this Court and in the court below. Appellees have presented valid non-constitutional claims against the United States for the payment of the full salaries to which they are entitled under the applicable pay statutes.

B. The Fiscal 1980 Limitation (Adopted October 12, 1979) Does Not Apply To The Judiciary

An additional non-constitutional ground for affirmance exists with respect to fiscal 1980. Pub. L. No. 96-86 specifically refers only to "funds available for payment to *executive employees, which includes members of Congress* who under existing law are entitled to approximately 12.9 percent increase in pay. . . ." (emphasis supplied). Pub. L. No. 96-86 makes no reference to the Judiciary and, significantly, leaders of Congress acknowledged that the limitation could not be applied to federal judges. 125 Cong. Rec. S14486. Appellees submit that this limitation did not apply to the Judicial Branch.

It is well established that the language of a statute controls unless there is some ambiguity. This "plain meaning" rule is a basic principle of statutory construction. 2A. Sutherland, Statutory Construction, § 48 (4th ed. 1973); *Tennessee Valley Authority* v. *Hill, supra,* 437 U.S. at 184, n. 29.

The "plain meaning" of the term "executive employees" clearly limits those affected to employees of the executive branch. The term is followed by the phrase "which includes Members of Congress", indicating further that Congress recognized its members would not be considered "executive employees" and that if they were to be subject to the 5.5% limitation, it was necessary to specify that fact. If Congress had intended that federal judges be subject to the 5.5% limitation, it could have easily made this clear by adding the phrase "and federal judges." It did not do so and, in

the absence of such specificity, Pub. L. No. 96-86 should not be read to include federal judges. Appellant's contention (ASG Bf. at 49) that "executive employees" is a term of art which should be read to include all persons covered by the Adjustment Act ignores the fact that, if so, it would have been entirely unnecessary to include specific reference to "Members of Congress", as they too are covered by the Adjustment Act.

That the limitation does not apply to judges is also clear from the comments of Members of Congress in adopting the Act. Many Members acknowledged that the "roll back" of salaries to levels below those in effect between October 1, 1979 and October 11, 1979, could not apply to judges. Senator Stevens, one of the Senate managers of the Joint Resolution, described the judges' pay situation as of that date:

> We have a pay adjustment now of 12.9 percent. Because of the failure to put on a pay cap, we have judges getting 12.9 percent for the rest of their lives. There is nothing we can do about that. 125 Cong. Rec. S14486.

Senator Stevens also commented that "we have a situation where one branch of the Government has received a 12.9 percent increase in salary, *and we will never lower that.*" (*Id.* at 14487). (emphasis supplied).

III. THE ANNUAL COST-OF-LIVING SALARY ADJUSTMENT IS AN INTEGRAL PART OF JUDICIAL COMPENSATION, THE WITHHOLDING OF WHICH VIOLATES ARTICLE III, SECTION 1 OF THE CONSTITUTION.

In each of the fiscal years 1977, 1978, 1979 and 1980 Congress withheld a portion of the compensation to which

judges were entitled by law, and thereby diminished their compensation protected by Article III, section 1. Whether this was accomplished by temporary limitations on the use of current appropriations or by some implied amendment to the Adjustment Act for each particular year, as the ASG contends, is immaterial from a constitutional standpoint. Congress' action in each year constituted an unconstitutional diminution in compensation.

Appellant contends with respect to the first three adjustments (fiscal years 1977, 1978 and 1979) that these were only an expectancy which did not vest, and that the right to a salary adjustment does not become "part of judges' compensation" until it becomes "payable" on October 1 of each year.[47]

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[47] The ASG has conceded for fiscal 1980 that, since the refusal to fund did not become law until October 12, 1979, and the adjusted salaries became payable on October 1, the right to the 1980 adjustment vested. The same is true with respect to fiscal 1977. For judges, the first day of the first pay period of the fiscal year begins at 12:01 a.m. on October 1. Since the limitation on the use of funds for fiscal 1977 was not signed until the day of October 1, 1976, the fiscal 1977 adjustment became payable before the limitation was approved. Indeed, in the district court, appellant conceded the validity of the argument that, "at least for several hours on October 1 [1976] judges were entitled to the higher salary". See, Motion to Affirm, 79-983 at 22-23, n. 23. Appellant now contends that fractions of days should be ignored.

The "rule" upon which the ASG relies is claimed to derive from *Lapeyre* v. *United States*, 84 U.S. (17 Wall.) 191 (1872), but is itself an exception to the general rule. As explained in *Louisville* v. *Savings Bank*, 104 U.S. 469 (1881), the *Lapeyre* test was developed for those circumstances "when the evidence does not show the necessity of regarding fractions of a day." 104 U.S. at 476. When there *is* a necessity to regard fractions of a day, the rule is to "ascertain the precise hour when a statute took effect by approval of the executive," 104 U.S. at 478.

The Acting Solicitor General acknowledges that the "limitation" contained in Pub. L. No. 96-86 was not adopted by Congress until "11 days after the cost-of-living increase for fiscal year 1980 had gone into effect for Judges." (Bf. at 11-13, 51, n. 43). This *reduction* is defended by the ASG solely on the theory that to establish a violation of Article III, section 1, judges must demonstrate that any challenged reduction was part of a discriminatory scheme designed to encroach upon the independence of the Judiciary.

To support his arguments, the ASG relies on a lower State court decision that has been overruled and held for naught by the Supreme Court of that State,[48] and on such obviously inapplicable cases as one dealing with employment rights of untenured teachers[49] and another concerned with parole rights of convicts.[50] The few other authorities cited by appellant are badly misconstrued or misapplied.

Appellees submit that the right to a cost-of-living salary adjustment is an integral part of judges' compensation. 28 U.S.C. § 135 specifically so provides. It is not an inchoate or unenforceable "expectancy". In addition, there is no requirement in the Constitution or in any decided case, that to establish a violation of Article III, section 1 involving a direct diminution in compensation, judges must prove some insidious plot to discriminate against them and compromise their independence. The task of assembling evidence to prove such motive demonstrates that the ASG's proposed rule of law is ludicrous. The arguments advanced by appellant are refuted by the entire history and experience

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[48] *Olson* v. *Cory*, 609 P.2d 991 (Cal. 1980) *rev'g* 93 Cal.App. 3d. 942 (1979), See pp. 52-53, *infra*.

[49] *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), discussed at p. 56, *infra*.

[50] *Greenholtz* v. *Nebraska Parole Inmates*, 442 U.S. 1, (1979), see p. 56, *infra*.

of the Compensation Clause, by every case interpreting the Clause, and by common sense.

A. The History And Purpose Of The Compensation Clause

The purpose of Article III, section 1 was to perfect the basic plan of Articles I, II and III of the Constitution, to make each branch of the government separate and independent of the others. The Framers of the Constitution were acutely aware of the need for an independent judiciary and were properly concerned about the inherently defenseless status of the Judicial Branch and its need for special protection. As Hamilton stated in The Federalist No. 78:

> The judiciary is beyond comparison the weakest of the three departments, . . . it can never attack with success either of the other two; and . . . all possible care is requisite to enable it to defend itself against their attacks.
>
> The Federalist No. 78 (A. Hamilton).

Thus, the Framers saw the need to keep judges independent as to their tenure and compensation. Hamilton further explained in The Federalist No. 79:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, *the power over a man's subsistence amounts to a power over his will.*
>
> The Federalist No. 79 (A. Hamilton) (emphasis supplied).

The colonists were well aware of the evils resulting from an Executive or Legislature that might control the tenure or compensation of the judiciary. The colonial pamphleteers bitterly complained that "if the bench were occupied by 'men who depended upon the smiles of the crown for their daily bread' the possibility of having an independent ju-

diciary as an effective check upon the executive power would be wholly lost". *A Letter from a Freeman of South Carolina* . . . (Charleston 1774) quoted in Bailyn, *The Ideological Origins of the American Revolution* 107 (1967). In the Declaration of Independence, the colonists indicted the King for having "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

Article III, section 1 responds directly to this concern. Madison wrote in The Federalist No. 51:

> It is equally evident that the members of each department should be *as little dependent as possible* on those of the others *for the emoluments annexed to* their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be nominal. The Federalist No. 51 (J. Madison) (emphasis supplied).

In the same vein Chancellor Kent noted:

> The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution of the United States on the subject was an improvement upon all our previously existing constitutions.
>
> 1 Kent Comm. § 294 (11th ed. 1867).

Justice Story noted: "Without the provision [requiring undiminished compensation], the other, as to the tenure of office would have been utterly nugatory, and indeed a mere mockery." 2 Story § 1628 (ed. 1836) (explanation added).

This Court has consistently interpreted the Compensation Clause in keeping with these historical origins. The economic crisis of the 1930's gave rise to two important cases, *O'Donoghue* v. *United States,* 289 U.S. 516 (1933) and *Booth* v. *United States,* 291 U.S. 339 (1934), which demonstrate this point clearly. During the Great Depression, Congress found it necessary on a number of occasions to reduce the salaries of all government employees. Cognizant of the prohibitions of the Compensation Clause, however, Congress always excepted from any reduction the salaries of judges "whose compensation may not, under the Constitution, be diminished during their continuance in office." *O'Donoghue,* 289 U.S. at 529.

In *O'Donoghue,* the question before the Court was whether an Associate Justice of the Supreme Court of the District of Columbia was a judge appointed pursuant to Article III, section 1, and thus a judge protected under the Compensation Clause. In analyzing this issue, the *O'Donoghue* Court specifically referred to the writings of Mr. Justice Story and Alexander Hamilton (The Federalist, No. 78 and No. 79), as well as Chief Justice John Marshall's profound observation, in the course of the debates of the Virginia State Convention of 1829-1830, that:

> The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience; . . . I have always thought, from my earliest youth til now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary.
> 289 U.S. at 532.

The *O'Donoghue* Court concluded that District of Columbia judges came within the protections of Article III.

In *Booth* v. *United States,* 291 U.S. 339 (1934), the Court held that a retired federal judge was an Article III judge whose compensation could not be diminished despite the fact that salaries of federal employees generally were reduced, *i.e.* there was no discrimination. See fuller discussion of *Booth* at pp. 62-64 *infra.*

In both cases, it is important to note that the statutes in question exempted "judges whose compensation may not . . . be diminished during their continuance in office . . . ." *O'Donoghue,* 289 U.S. at 529.

A more recent instance in which Congress recognized that diminution of judicial compensation is prohibited under the Constitution, is the statute which forms the basis of appellees' claims in the instant case—the Adjustment Act. It provides that comparability adjustments which result in a *reduction* of an employee's pay are permissible *except* to the extent that such an adjustment would reduce the salary of "any individual whose compensation may not, under section 1 of Article III of the Constitution of the United States, be diminished during such individual's continuance in office." 79-983, J.S. 26a-27a

Nothing could more clearly demonstrate Congress' recognition that the Compensation Clause renders unconstitutional any direct diminution in judicial compensation, whether achieved through the lowering of salary levels or the refusal to appropriate sufficient funds to pay the full compensation mandated by law.

During the same period that *Booth* and *O'Donoghue* were decided, the Court also decided three cases involving the extent to which Congress might impose an income tax, applicable to the nation at large, upon the salaries of federal

judges, *Evans* v. *Gore,* 253 U.S. 245 (1920), *Miles* v. *Graham,* 268 U.S. 501 (1925), and *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939).

Evans is noteworthy primarily because the principles enunciated therein regarding the interpretation and application of the Compensation Clause continue to define its scope and meaning.[51] In applying those principles, the Court reviewed the historical authorities previously discussed and made clear that Article III, section 1 should be interpreted broadly in a way that achieves its objectives. In *Miles* v. *Graham,* the Court applied *Evans* to the case of a judge who took office *after* rather than before the income tax law was enacted, and as in *Evans,* held that he could not be taxed.

The next income tax case was *O'Malley* v. *Woodrough.* Judge Woodrough, like Judge Graham in the *Miles* case, had been appointed to his position after the effective date of the applicable tax law. The Court overruled the holding in *Miles* that "there is no power to tax a judge of a court of the United States on account of [his] . . . salary . . . ." While the Court refused the urging of the Solicitor General to also overrule *Evans,* the ASG suggests that *O'Malley* at least reflects the dissent of Justice Holmes in *Evans.* 253 U.S. at 265. (ASG Bf. at 63, n. 52). In light of that observation, it is useful to recall Mr. Justice Holmes' words in *Evans* that the Constitution's concern with undue dependence by the judiciary, "is a very good reason for preventing attempts to deal with a judge's *salary as such,*" but does not relieve judges from the "ordinary duties of a citizen". (emphasis supplied). The distinction between attempts to deal with a judge's salary "as such," and the general obligations of citizenship, was clearly drawn.

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[51] See *Atkins* v. *United States,* 556 F.2d 1028, 1043-45 (Ct. Cl., 1977), *cert. denied* 434 U.S. 1009 (1978).

Several principles emerge clearly from this constitutional history and judicial precedent. Article III, section 1 is a prophylactic measure: it removes from Congress any possible temptation to punish the judiciary, and any temptation of the judiciary to favor Congress or Congressmen in any way. It is also designed to ensure that quality candidates are attracted to and retained within the judiciary, by a promise of adequate and assured compensation. Whatever Congress has promised during any part of a judge's tenure, he can count on having throughout his career as a judge. To quibble about the motive that Congress may or may not have expressed or intended, or to argue that the entitlement is contingent until October 1 of each year, eviscerates the absolute protection intended and expressed in Article III, section 1. It also ignores the clear language of the Adjustment Act as well as that of 28 U.S.C. § 135 and similar statutory provisions.

B. The Right To Cost-of-Living Salary Adjustments Is A Component Of Judges' Compensation.

For years Congress specified judicial compensation in 28 U.S.C. § 135 (and similar statutory provisions) by a precise sum. But when the Adjustment Act was enacted in 1975, Congress amended this section to provide, "Each judge . . . shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 . . . as adjusted by section 461 of this title [the Adjustment Act]." Pub. L. No. 94-82, Section 205, 89 Stat. 422. Congress thus defined the compensation of a federal judge to include an annual percentage adjustment in salary equal to the percentage adjustment made in the salaries of General Schedule employees.

The ASG's argument that the right to the annual salary adjustment is not a protected element of judges' salaries until it becomes payable on October 1 of each year is in-

consistent with the clear language of 28 U.S.C. § 135 as well as the entire history of Article III, section 1. Providing a statutory formula for determining a judge's salary, and then declining to appropriate funds sufficient to pay that salary clearly violates the prohibition of the Compensation Clause.

This issue was resolved 177 years ago in the very first reported case to consider the Compensation Clause, *United States* v. *More,* 7 U.S. (3 Cranch) 159 (Ct. D.C. 1803) (Marshall C.J., concurring). At issue was an Act of Congress abolishing fees charged by justices of the peace in the District of Columbia. Judge More claimed that the law could not be invoked as to justices of the peace who were in office at the time such fees were set by an Act of Congress. The Court agreed, holding that the right to such statutorily mandated fees was a component of compensation which could not be withdrawn. The justices' fees were not payable until the services were rendered. Thus, the amount of fees any justice would receive in any year was unknown, or only an "expectancy". Nevertheless, the court held that as to sitting justices, the abolition of these fees was a diminution of compensation in violation of Article III, section 1.

As the court below correctly recognized, Article III, section 1 obliges Congress to declare what the compensation of a federal judge shall be. It may do so by defining the salary component of a judge's compensation in dollars, as it did prior to 1975, or in terms of a specific formula, as 28 U.S.C. § 135 and related statutory provisions now do. Formulas for determining compensation are common in employment contracts, statutes and other provisions covering most of the American work force, including federal, state and local government officers and employees. While a judge's salary adjustment may not be payable until after October 1 of a particular year—a point upon which appellant so heavily relies—the entitlement or right to that

adjustment has existed since the enactment in 1975 of the Executive Salary Cost-of-Living Adjustment Act. The continuing right to the salary adjustment is provided by 28 U.S.C. §§ 135, 5, 44(d), 213 and 252 and is part of the Compensation protected by Article III, section 1.

The Supreme Courts of Delaware and California recently addressed this question in interpreting their own constitutional prohibitions against the diminution of judicial salaries. Citing this Court's decision in *Booth* v. *United States, supra,* the Delaware Court observed that the constitutional provision must logically "apply as well to a threat of removing a salary adjustment as the salary itself. . . ." *Stiftel* v. *Malarkey,* 384 A.2d 9, 15 (Del. 1977). In that case, the Court considered the same arguments appellant advances here and said:

> It is argued that a formula supplement like the one in this case is a "future" promise which can be revoked with impunity, whereas a stated salary increase would be legally different. We fail to see the basis for such a distinction. 384 A.2d at 16.

The Court viewed the annual cost-of-living adjustments *as a part of the judges' compensation* which may not be revoked.[52]

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[52] The ASG states that *Stiftel* did not pass on the issue of whether judges were entitled to cost-of-living adjustments before the annual effective or "payable" date. (ASG Bf. at 56, n. 47). But the *Stiftel* court unequivocally held that the right to annual adjustments vested with the effective date of the Cost-of-Living Adjustment Law, not the effective date for annual payments. It stated:

> *The C.O.L.A. law, including its formula, was duly enacted in 1975; when it was enacted, it was applicable* to many public officers, including judges, and the efforts in 1976 to take these increments away were forbidden by Article XV, section 4, of Delaware's constitution. *Id.* at 16 (emphasis supplied).

In *Olson* v. *Cory, supra,* the Supreme Court of California held unconstitutional an attempt by the California Legislature to place a limit on cost-of-living increases previously provided for judicial salaries. In ruling that this legislation was in conflict with the constitutional provision prohibiting the diminution of judges' salaries, the court stated:

> Security of both tenure and subsistence are important factors in creating and maintaining an independent judiciary. These factors are met by insuring relatively long, fixed terms of office . . . and foreclosing reduction in salary during term of office. Should the state arbitrarily limit the cost-of-living salary, the level of subsistence would be reduced. 609 P. 2d at 998.[53]

Appellees submit that, since passage of the Adjustment Act in 1975, the right to a cost-of-living adjustment has been a component of a judge's compensation. Any argument to the contrary flies in the face of the clear language of 28 USC § 135 and similar statutory provisions. Moreover, the views of two Presidents, the Congress, and various agencies, to the effect that the temporary limitations did not affect the lawful salary levels as adjusted, support the conclusion that the right to such adjustments is now a part of the salary of each judge, as defined by statute. Clearly, if annual salary adjustments were mere expectancies, the restrictions contained in the appropriations acts would have eliminated, not just postponed, them. Yet, the ASG concedes that the appropriations limitations were temporary only and the salary adjustments were not permanently eliminated.

These concessions notwithstanding, appellant urges that a cost-of-living salary adjustment *formula* can never be

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[53] The ASG relies on the decision of the appellate court, *Olson* v. *Cory,* 156 Cal. Rptr. 127 (Ct. App. 1979), which was reversed by the Supreme Court. (ASG Bf. at 55 and 59).

part of the compensation of a federal judge protected by Article III, section 1, because it would "unduly limit the constitutional province of Congress." (ASG Bf. at 58). This is obviously wrong. First, it has been held from the earliest that Article III, section 1 and its State counterparts protect judges' compensation against diminution beyond the mere dollars in each paycheck. *United States* v. *More, supra, Olson* v. *Cory, supra,* and *Stiftel* v. *Malarkey, supra,* all support this proposition. While the Constitution guarantees no federal judge that the Congress will improve his financial standing, it absolutely prohibits the Congress from worsening it. This is the Constitutional limitation on the "province" of Congress.

> What might be extravagant today, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the Legislature to vary its provisions in conformity to the variations in circumstances; yet *under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.* A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.

The Federalist No. 79 (A. Hamilton). (emphasis supplied).

Second, the security of having a cost-of-living adjustment is enjoyed as a present assurance. If the right to that adjustment can be withdrawn at the prerogative of Congress, judges are thereby *presently* "placed in a less eligible situation." Any power to deny judges the security of the cost-of-living salary adjustment established by statute as part of their defined salary would be the power to "change the condition of the individual for the worse." If Congress can constitutionally withhold that portion of a judge's compensation represented by the annual salary adjustment, there

is no constitutional obstacle to its withholding a portion of the fixed sum to which a judge is entitled under Section 225 of the Federal Salary Act of 1967. Statutory provisions such as 28 U.S.C. § 135 make no distinction between the two elements of judges' compensation. We submit that Congress may not constitutionally withhold part or all of either.[54]

The ASG maintains that "compensation" includes nothing beyond that which has been received in the past. A statutory entitlement to adjusted compensation is viewed as a mere "expectancy". Extended logically, this concept would allow Congress to approve a quadrennial adjustment under the Federal Salary Act raising base compensations (including federal judges'), and then, before the first payment date, for political or other reasons, pass an appropriations limitation or other prohibition against payment. Such a narrow interpretation is patently incorrect, for the prohibition against diminution of compensation must be coextensive with the potential for undue financial influence by Congress upon judges. The purpose of Article III, section 1 was to place federal judges *beyond the influence* of the Congress or the Executive in matters affecting their finances. This includes any part of the compensation to which they are entitled by statute, and is not limited to amounts previously paid. See discussion in Brief of *amicus curiae,* Chicago Bar Association at p. 19.

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[54] In footnote 45 (ASG Bf. at 52) appellant also refers to statements in Congressional debates that adjustments in salary are to be made in October of each year. That annual adjustments are payable commencing in October, however, does not mean that the right to an adjustment is not already in existence. On the contrary, if that were the case, *additional legislation* would be needed each October to affect the payment. Yet it is clear that no such additional legislation is required. On October 1 of each year, the salary adjustment becomes payable absent any further action by Congress.

The weakness of the ASG's position is also evident from the authorities he cites to support it. In arguing that federal judges have merely an expectancy of salary adjustments, he cites *Board of Regents* v. *Roth,* 408 U.S. 564 (1972), a case involving the claims of an untenured school teacher to be re-hired. The teacher had no contract, let alone a statutory or constitutional entitlement to compensation.[55]

United States v. *Larionoff,* 431 U.S. 864 (1977) (cited at ASG Bf. at 54), established that a member of the Armed Forces *had a vested right* to a re-enlistment bonus *even though the payment date had not yet been reached* when Congress voted to rescind the bonus. *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1 (1979), deals with distinctions between parole revocation and parole granting. It has nothing whatsoever to do with the issues before this Court.

Absent any authority to support its position, appellant attempts to amend the Constitution by changing the tense

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[55] In footnote 46 (ASG Bf. at 53), appellant suggests that several contingencies could defeat the judges' expectation of an annual salary adjustment. These "contingencies" may be dealt with swiftly: 1) that General Schedule employees receive no adjustment—but since the judges' entitlement is only to the adjustment General Schedule employees receive, this would not deprive judges of any rights under the formula; 2) that Congress could repeal the Comparability Act—then there would be no salary increases for judges either, in keeping with, *not* contrary to, the statutory provisions involved; 3) that Congress could repeal the Adjustment Act which grants federal judges the same annual adjustment as General Schedule employees—surely appellant must realize that that would be precisely the same unconstitutional action challenged here; 4) that Congress could supersede the increases "for high-ranking federal officials"—once more, whether Congress can do that or not is precisely the issue in this case. Appellant concludes with an in-

of the Compensation Clause. The ASG argues that cost-of-living increases are not part of judicial compensation until they become "payment 'receive[d] for their services' (Article III, section 1)" (ASG Bf. at 53). The ASG's insertion of "[d]" to change the constitutional provision to the past tense is no more subtle than it is convincing.[56] It is the right to the annual salary adjustment that since 1975 has been an integral part of judicial compensation.

The ASG next argues, without citation, that this case would be the same if Congress had "expressly reserved . . . the power to supersede an annual salary increase prior to its effective date." (ASG Bf. at 54). In fact, the Congress reserved itself no such power; and the discussion of what Congress *might* have done only points up the inadequacy of appellant's statutory analysis. Congress granted a cost-of-living adjustment to federal judges as part of their compensation with no conditions attached.

Since Congress reserved no power in 1975 to alter or withhold adjustments for judges, the ASG argues that "[s]uch authority to amend or repeal legislation is necessarily retained by Congress in all cases". The general rule of statutory construction, that Congress can undo what Congress has done, has always been subject to the strictures of the Constitution. Otherwise, Congress could now

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apposite reference to *Benedict* v. *United States*, 176 U.S. 357 (1900), which held, on statutory interpretation grounds, that a retired federal judge was not entitled to bonus pay for taking assignments to the criminal circuit in New York, since he no longer took such assignments. The bonuses were paid on an assignment basis; no permanent adjustment in salary was at issue.

[56] The ASG concedes that the fiscal 1980 adjustments vested on October 1, 1979, at the latest. (ASG Bf. at 51, n. 43). Yet no judge actually *received* a higher paycheck.

lower federal judges' salaries to their 1960 (or 1860) levels under the rationale that the salary increases from 1960 (or 1860) to the present had also been granted by Congress.[57] This argument is not only contrary to all decisions and commentaries on, and the history of, Article III, section 1, but is at odds with appellant's own statement, in discussing *United States* v. *More, supra,* conceding "that the Compensation Clause extends to elements of judges' compensation that have gone into effect but have not yet been paid." (ASG Bf. at 56, n. 47). Of course, *More* compels this result. What Congress unsuccessfully attempted in *More* was precisely what Congress has attempted here—to abolish a compensation method under which an undetermined amount of money was to be received at some time in the future.

The ASG also seeks support from the Congressional Research Service's Report, *Diminution of Judicial Salaries,* discussed at p. 35 *supra.* (ASG Bf. at 55, n. 47). He fails to note that this study, which analyzed only the fiscal 1980 limitation (Pub. L. No. 96-86), concluded in unequivocal terms that the fiscal 1980 limitation could not constitution-

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[57] *Glidden Co.* v. *Zdanok,* 370 U.S. 530 (1962), offered by appellant for the general proposition that Congress can adjust terms of tenure or salary of "federal officers," makes the explicit reservation, "apart from this provision," referring to Article III, section 1. 370 U.S. at 534. *United States* v. *Dickerson,* 310 U.S. 554 (1940), also cited by the ASG, strongly supports appellees' position on the non-Constitutional argument (that Congress does not repeal an entitlement solely by failing to appropriate). *Dickerson* simply does not involve Article III, section 1. *Butler* v. *Pennsylvania,* 51 U.S. (10 How.) 402 (1850), exclusively concerns employment of state officers and also does not involve Article III, section 1. In *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810), appellant's final citation, the Court actually held that the Georgia legislature was *prohibited* from undoing its own grant of real property. The Court held that the federal Constitution imposed limitations on the general power of a legislature to take back what it has given. 10 U.S. (6 Cranch) at 139.

ally be applied to Article III judges. The Report states forcefully that "[w]e have in the course of the paper considered several possible arguments with respect to interpretations that would allow an escape from the diminution of compensation clause but have found no textual or precedential support for them." CRS at 25-26. This conclusion is equally applicable to the other years here involved.

The CRS also included the Adjustment Act as one of the "pay acts" which comprise the "machinery" for determining "what sum shall be received by each judge", quoting from *Miles* v. *Graham, supra.* CRS at 20. As previously noted, (p. 35 *supra*) the Service concluded that "there seems to be . . . no precedent for a contention that the entitlement to compensation of judges which cannot be reduced arises only with the enactment of an appropriations bill". CRS at 23.

The ASG also refers to the proceedings of the Constitutional Convention. In doing so, he relates the efforts of Madison to impose a restriction on compensation increases, but omits any mention of Madison's corollary cost-of-living proposal based upon the price of a commodity of standard value, such as wheat.[58] Madison was against granting Con-

[58] See generally, 2 M. Farrand, Records of the Federal Convention of 1787 at 44-45 (ed. 1966) (Proceedings of July 18, 1787). The framers understood that the term "compensation" could include a cost-of-living adjustment. Madison was opposed to allowing increases or decreases and was confident that a cost-of-living adjustment plan would moot the need for other salary increases for federal judges. Others disagreed, but only because they felt such a cost-of-living adjustment formula might not provide adequate enough compensation. But every participant in the debate would have been surprised by the suggestion that a cost-of-living adjustment formula could not be part of a judge's protected compensation. If such a formula, once enacted, were not part of the compensation against which diminution was forbidden, Madison would have been suggesting a very inadequate justification indeed for eliminating all other means of raising federal judges' salaries.

gress the power to affect judges' pay in any way, but compromised on the ground that the more worrisome dependence was that resulting from allowing Congress to *diminish* federal judges' compensation. The ASG apparently contends that, because Congress may refuse to enact salary increases for Article III judges, it may rescind a salary adjustment mandated by statute which has not yet been paid (ASG Bf. at 58). There is an obvious difference between a failure to increase and the withdrawal and diminution of present rights. The Constitutional compromise was to forbid any such diminutions, while allowing increases.

Appellant's final contention is that the result sought by appellees would deny Congress any future flexibility in determining the pay of federal judges. Appellees disagree. Should the President and Congress concur that, because of concerns for budget deficits or inflation, annual cost-of-living salary adjustments should be withheld, they may do so by refusing to adjust General Schedule salaries under the Comparability Act. In that event no increase would be due federal judges under the Adjustment Act. Nor is there any prohibition against Congress taking itself and the top-level executives out of the compensation formula afforded to General Schedule employees and judges. All that Congress is forbidden from doing is adjusting General Schedule salaries pursuant to the Comparability Act without offering the same adjustment to the less than 1000 federal judges. Given the number of federal employees subject to the Comparability Act—approximately 1.6 million—it is absurd to argue that including adjustments for less than 1000 Article III judges deprives the Congress of "flexibility" or would have any appreciable impact on its ability to combat inflation or balance the budget.

As demonstrated, no case supports appellant's view that Congress may constitutionally refuse to pay part or all of

a judge's compensation, whether specified in dollars or determined under a compensation formula. *More, Stiftel,* and *Olson* all directly reject this contention. Appellant's basic logic is that compensation includes nothing more than dollars-in-hand received. The rationale behind Article III, section 1 rejects this, as do practicality and common sense. And the Constitutional framers themselves, as shown by their discussions, would have rejected it as well. Conversely, they undoubtedly would have endorsed with enthusiasm the present compensation formula, which includes annual salary adjustments, *provided* that such adjustments were absolutely secure from interference by the other branches of the government.

C. To Prove a Violation of the Compensation Clause, Appellees Do Not Have to Establish That the Diminution In Compensation Discriminates Against Judges.

Appellant argues that, even assuming that the compensation of judges has been diminished, the judgment below must still be reversed on the ground that a diminution in compensation of federal judges is not unconstitutional unless it is part of a discriminatory scheme designed to encroach upon the independence of the judiciary.

In other words, the ASG would have this Court amend Article III, section 1 by judicial decision to read:

> Judges, . . . shall . . . receive for their services, a compensation, which shall not be diminished during their continuance in office, *except when no discrimination which undermines their independence is intended or effected.*

The opinion of the district court soundly rejected such an interpretation of the Compensation Clause, described by the *amicus curiae,* American Bar Association, as "an attempt to engraft a novel concept without support in history or

authority which would completely undermine the Compensation Clause . . . ." (ABA Bf. at 8-9). It has never been held by any court that proof of a discriminatory animus is necessary to render a direct diminution of a federal judge's compensation unconstitutional.[59] The rule has always been, and no case stands to the contrary, that congressional action which reduces or withholds from a judge that to which he is entitled as compensation is, without more, unconstitutional. *Booth* v. *United States,* 291 U.S. 339 (1934).

The setting of *Booth* was a time of national economic peril. During the Great Depression, the federal government considered it necessary to reduce the wages of its employees a number of times. These reductions were not applied to Article III judges. Congress itself recognized that such a reduction would violate Article III, section 1. For example, Pub. L. No. 72-212, 47 Stat. 382, 402, section 197(5) (1933) provided:

> [t]he salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum.

This section accompanied other provisions cutting the salaries of other federal employees, including Members of Congress, employees of the District of Columbia, mail carriers, etc. *See, e.g.,* Pub. L. No. 72-212, 47 Stat. 382, 401, section 105 (1933).

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[59] Only where the compensation of federal judges has been affected by the indirect impact of a general burden of citizenship, has this Court or any court suggested such a prerequisite to a claim of unconstitutionality. See *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939) (general income tax); *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978) (inflation).

The next year, more expenditure reductions were deemed economically necessary. In the Act to Maintain the Credit of the United States Government of 1933, Pub. L. No. 73-2, 48 Stat. 8, pensions were reduced, and three months later, in an Act entitled Fourth Deficiency Act, Fiscal Year 1933, Pub. L. No. 73-78, 48 Stat. 283, the salaries of additional federal employees were reduced. Section 13 of the latter act, 48 Stat. 283, 307, cut the retirement pay of federal judges by 15%. In the same statute, a host of other federal employees' salaries were reduced in similar amounts. *There was no discrimination.*

Judge Booth, a retired federal judge whose salary had been reduced by 15%, brought suit against the United States. The Solicitor General argued that *retired* judges were not entitled to the protection of the Compensation Clause. The Court disagreed and ruled that retired judges were entitled to the guarantees of Article III, section 1, and held, therefore, that the attempted diminution was unconstitutional.

If the prohibition against diminution were meant to contain the additional proviso urged by the appellant, proscribing diminution of a judge's compensation only when accomplished for the purpose of discrimination, the Court in *Booth* could not have ruled the challenged statute unconstitutional. The reduction in compensation at issue in that case was in the context of a *general cut in salaries for all federal employees, in the face of severe economic conditions.* The Court would, at least, have been forced to *inquire* into whether the 15% reduction in pay for retired judges was a discrimination calculated to interfere with their independence. Such a question was never even posed.

Unable to avoid the force of the *Booth* decision, appellant simply responds that *Booth* was decided prior to the Court's decision in *O'Malley* v. *Woodrough, supra. O'Mal-*

ley, which dealt with the application of the federal income tax to a judge's salary, held that liability for payment of the income tax was a common duty of citizenship to which a federal judge was also subject. That case made no attempt to overrule or distinguish *Booth,* for no such action was necessary. The cases are not inconsistent with each other or with the district court's decisions in these cases.

A comparison of *Booth* and *O'Malley* illustrates the distinction between direct and indirect diminution. A *direct* diminution is one that deals with judges' salaries "as such"; an indirect diminution is one that merely impacts upon compensation as an unavoidable consequence of a commonly shared duty of citizenship. Justice Holmes, in his dissent in *Evans* v. *Gore* (upon which the ASG so heavily relies), made the distinction perfectly clear. The constitutional reason for prohibiting Congress from reducing judicial pay, based on the need to preserve an independent judiciary, "is a very good reason for preventing attempts to deal with a judge's salary *as such,*" (emphasis supplied) but was in Mr. Justice Holmes' view, an inappropriate factor in determining whether a judge ought to be subject to the "ordinary duties of a citizen." 253 U.S. at 265.

Justice Holmes was making precisely the distinction between a case like *Booth* (an attempt to deal with a judge's salary "as such") and a case like *O'Malley* (a common duty of citizenship, affecting judicial salaries only indirectly). *Booth* and *O'Malley* thus combine to form a single rule—that Congress *may not* enact a law withholding some part of a federal judge's compensation; but it *may* enact a law that applies to virtually all citizens and has the indirect effect of lowering the take home pay of all those to whom it applies (including judges).

That explanation is precisely the one given by the United States Court of Claims in a case much relied upon by the

ASG, *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009, 1045 (1978):

> What *O'Malley* did add to the body of learning on the Clause was that nondiscriminatory actions of Congress, those affecting the public generally, though indirectly bringing about the lowering of judges' "take-home pay," would nevertheless pass muster under the Clause.

The dissenters in *Evans*, who initiated the distinction between direct and indirect diminution, were Justices Holmes and Brandeis. Justice Brandeis was still on the Court at the time of *Booth*, and he joined in the Court's unanimous Opinion. It is disingenuous, therefore, for the ASG to feign confusion on the direct-indirect distinction. And it is worse still to cite the opinion of the Court of Claims in *Atkins* as rejecting the direct-indirect diminution distinction, for that opinion expressly upheld it.

The constitutional basis for the differing tests between direct and indirect diminution was ably expressed as early as 1843 by the Supreme Court of Pennsylvania, interpreting its own analogous provision by reference to the United States Constitution. In *Commonwealth ex rel. Hepburn* v. *Mann*, 5 Watts & Serg. 403 (1843), the Pennsylvania legislature had imposed a tax on the salaries of officers serving under the Constitution and statutes of Pennsylvania and certain other persons. It was not a tax upon the general public.

The court in *Hepburn* first noted that no "insidious" motive of the legislature was involved, *i.e.* there was no purpose to attack judicial independence or discriminate against judges through this tax. The court further observed, in language similar to that found in Justice Holmes' dissent in *Evans*, that the income of a judge "is a proper subject of taxation" so long as the tax is imposed upon all citizens alike. For then the judges' "security will . . . consist

in being placed on the same footing with other citizens, and the abuse of them . . . will be speedily corrected." *Id.* at 417. The court then held that a *selected* tax imposed upon a large class (but less than the entire public) may not be imposed upon the judiciary.

In place of Justice Holmes' rule forbidding all diminutions in a federal judge's salary "as such," a rule that has been upheld in every decided case, the ASG would proffer a rule requiring a court to ascertain whether or not Congress intended, or effected (the ASG does not tell us which) a discrimination against federal judges. The Congressional Research Service Report, *Diminution of Judicial Salaries,* rejected this interpretation when it concluded that "the diminution of compensation clause contains an express prohibition, compensation shall not be reduced while a judge continues in office, which is determinable *without reference to motivation.* . . ." CRS at 12. (emphasis supplied).

The need to make a specific finding of motive in the face of a direct diminution would eviscerate the prophylactic purpose behind Article III, section 1. That section was added to remove from the Congress, "as far as may be possible", the power to affect a federal judge's compensation for the worse. Consequently, *all* direct diminutions were forbidden. As the *amicus curaie,* ABA, points out, proof of legislative motive adverse to the judiciary would be impossible in the ordinary case, and the imposition of such a requirement would "frustrate the purposes of the Compensation Clause". (ABA Bf. at 14-15).

In this connection, mention should be made of one additional, highly relevant source for Constitutional interpretation: the Congress itself. Several times within this century Congress has passed laws which did or could diminish the compensation of federal employees, but which explicitly exempted federal judges for constitutional reasons. On each

occasion, federal judges could have been included without any claim of discrimination against them. A number of such laws were adopted during the Depression. See discussion of *O'Donoghue* v. *United States* and *Booth* v. *United States, supra.* Another is the very law in question in this case:

> [The Adjustment Act] shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of Article III . . . be diminished during such individual's continuance in office. 28 U.S.C. § 461(b).

These repeated exemptions are not an expression of Congress' generosity toward federal judges. Each reflects, unmistakably, the belief of the Congress that federal judges' salaries may not be reduced, even as part of a salary reduction for all federal employees. These instances all stand as the clearest evidence that even Congress patently disagrees with appellant's argument.

CONCLUSION

Appellees have established on grounds of statutory construction that judges remain entitled to the annual cost-of-living salary adjustments mandated by statute. Addressing the Constitution, Article III, section 1's proscription is broad and unequivocal: "Compensation . . . shall not be diminished." Nowhere does the Clause state that "compensation" is limited to cash-in-hand previously received; nor does it even hint that Congress may reduce or withhold compensation simply because judges are not the objects of discrimination.

The Clause was fashioned to achieve a nobel and essential purpose—a highly qualified, independent Judicial Branch secure from undue influence by either of the other Branches of Government—and has been lauded and pro-

tected by the Framers, constitutional historians and the courts for almost 200 years. The proposals advanced by the ASG, unsupported by precedent or historical experience, would totally undermine this purpose and would nullify Article III, section 1 as a means of ensuring judicial quality, equality and independence.

For the reasons stated herein, appellees respectfully submit that the judgments of the district court should be affirmed in both appeals.

Respectfully submitted,

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Attorneys for Appellees

August 12, 1980

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

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September 10, 1979

TO JUDGES OF THE UNITED STATES

SUBJECT: Judicial Compensation

I dispatched a memorandum on April 17, 1979, which outlined the compensation and benefits for circuit and district judges. In its outline of the salary component of judicial compensation at page 2, the memorandum averted to pending litigation which had the potential to have an impact on judicial salary rates and on the Director's ability to pay judcial salaries at their full salary rates, including the annual cost-of-living adjustments, from appropriations available to the Judicial Branch.

Since not all district judges nor circuit judges also potentially affected have been sent a copy, I attach for your information a copy of an order of the United States District Court for the Northern District of Illinois in this referenced action. *Will, et al.* v. *United States,* Civil No. 78 C 420 (N.D. Ill., order entered Aug. 29, 1979).* The court order grants the plaintiffs' motion for summary judgment on the basis of the finding that the actions of the defendant

* The names of the plaintiffs and their counsel are reflected in the attached order.

had resulted in a diminution of judicial compensation in violation of Article III of the United States Constituton. Count I involves the failure of the defendant to pay the cost-of-living adjustment under 28 U.S.C. § 461 (1976) for the period from October 1, 1976, through February 28, 1977. (New salary rates became effective on March 1, 1977, in accordance with 2 U.S.C. §§ 358,, 359 (1976). *See* 13 Weekly Comp. of Pres. Doc. 50 (Jan. 20, 1977), 42 Fed. Reg. 10297 (1977).) Count II involves the attempt of the defendant to deprive the plaintiffs of a cost-of-living adjustment under 28 U.S.C. § 461 (1976) effective October 1, 1977, through enactment of the Act of July 11, 1977, Pub. L. No. 95-66, 91 Stat. 270.

Since the court previously determined that the plaintiffs could maintain the action as a class action in accordance with Rule 23(b)(2) of the Federal Rules of Civil Procedure, I attach a copy of the order which defines the separate class for each of the two counts in the complaint. *Will* (order entered March 20, 1979).

The President has proposed an "alternative plan" for a pay adjustment to statutory pay systems (*e.g.*, the "General Schedule") under 5 U.S.C. § 5305(c)(1) (1976), to become effective on the first day of the first applicable pay period commencing on or after October 1, 1979, in the overall amount of 7%. 15 Weekly Comp. of Pres. Doc. 1530 (Sept. 3, 1979). If Congress should not disapprove this plan, the adjustment to the statutory pay systems would result in an automatic pay adjustment to the salary rates of judges in the amount of 7%. 28 U.S.C. § 461 (1976).

If the holding in *Will* for a 1977 cost-of-living adjustment were to become effective and assuming Congress will *not* disapprove the President's "alternative plan," the compu-

tations to determine the salary rates for judges effective October 1, 1979, would be as follows:

Event	District Judge	Circuit Judge
Base Salary Rate ..... Effective March 1, 1977 (42 Fed. Reg. 10297 (1977))	$54,500	$57,500
Salary Rate ..... Effective October 1, 1977 (includes a 7.05% cost-of-living adjustment, 13 Weekly Comp. of Pres. Doc. 1436 (Oct. 3, 1977))	58,300	61,600
Salary Rate ..... Effective October 1, 1978 (includes a 5.5% cost-of-living adjustment, 14 Weekly Comp. of Pres. Doc. 1480 (Sept. 4, 1978))	61,500	65,000
Salary Rate ..... Effective October 1, 1979 (includes a 7% cost-of-living adjustment, 15 Weekly Comp. of Pres. Doc. 1530 (Sept 3, 1979))	65,800	69,600

I must offer the caveat, however, that the rates at which the Director would be able to pay salaries (the "payable rates") would depend on any legislation to be enacted which limits the availability of appropriations under the control of the Director to pay salaries.

CARL H. IMLAY

Carl H. Imlay
General Counsel

Attachments

Supreme Court, U. S.
FILED
JUL 28 1980
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Nos. 79-983 and 79-1689

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
Appellant
vs.
HUBERT L. WILL, et al.,
Appellees.

On Appeals from the United States District Court for the Northern District of Illinois

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Nos. 79-983 and 79-1689

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
Appellant
vs.
HUBERT L. WILL, et al.,
Appellees.

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES[1]

INTEREST OF AMICUS CURIAE

The American Bar Association ("Association") has authorized the filing of the instant brief in support of appellees, addressed to the Government's contention that the Congress may enact legislation directly reducing the rates of compensation prescribed by statute for Article III judges, free from any Constitutional restriction, so long as such reductions cannot be shown to "discriminate against" Article III judges in purpose or effect or undermine their independence (Brief of Appellant, pp. 22, 60, 64 and n. 53;

[1]Pursuant to Rule 36(2) of the Rules of the Supreme Court, the written consents of the parties have been lodged with the Clerk of this Court.

see also, J.S., p. 3).[2] The interest of the Association in ensuring adequate rates of compensation, sufficient to attract to the bench and retain judges of the highest professional quality and integrity, is well known and of long standing.

In the Association's view, the Government's "discrimination" contention is contrary to the settled understanding of the meaning of the Compensation Clause. That contention, if accepted, would seriously, perhaps irreparably,

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[2]As to the other points in these cases, we note briefly:

(1) The Government's lengthy attempt to establish that the Acts withholding funds to pay increases in the judges' salaries were intended to enact "substantive" changes in the law is beside the point as far as Constitutional issues are concerned. If true, it would merely demonstrate that the Congress did, in fact, intend to diminish the judicial salaries prescribed by law.

(2) The Government's further contention that a judge's compensation, as provided by statutes in effect at the time he is serving or comes into office, may be decreased by the Congress at any time before the judge's salary is actually received is clearly without merit. A statute providing a salary for an Article III judge of X dollars plus a cost-of-living increase each year is no different in principle from a salary of X dollars plus $1,000 a year for each year of service. In each case the Congress cannot justify a reduction in the established salary during the judge's term of office by labeling the portion of the salary composed of the promised annual increases as mere "expectancies." The essence of the Compensation Clause of Article III is to provide a special protection for the future compensation of Article III judges which is not accorded to other Federal officers and employees, and to prohibit reductions in the rate of compensation promised to members of the Judiciary by statute. Here, although payments of the prescribed increases had not yet been received by the Judiciary, they had been statutorily prescribed, and it is any reduction of the rate of compensation "promised by law" that the Compensation Clause prohibits (*Evans* v. *Gore*, 253 U.S. 245, 254 (1920)) during the entire period of an Article III judge's tenure.

frustrate the purposes of the Constitutional protection, which are to ensure the independence of our Federal Judiciary and, of equal importance, to attract to and retain on the bench those "few men in the society" who "unite the requisite integrity with the requisite knowledge" for the proper discharge of the judicial function (The Federalist, No. 78, pp. 529-530 (Cooke Ed. 1961)).

These concerns have gained significance in light of the history of efforts to deal with judicial compensation in the past decade. From 1969 until 1975, Article III judges received no increases in their compensation despite increases of approximately 50% in the cost of living. This situation resulted not only in an unprecedented number of resignations from the bench, but also in increased difficulty in persuading qualified candidates to accept judicial appointments.

In 1975, the Congress enacted the Executive Salary Cost-of-Living Adjustment Act, Pub.L. 94-82, 89 Stat. 419, designed, among other things, to remedy the previous failure to accord judges necessary cost-of-living adjustments. That Act provided, for the first time, for annual adjustments in the rates of pay of the Judiciary, members of Congress, and certain high-level executive positions in an amount equal to the average of the annual adjustments accorded to General Schedule employees under 5 U.S.C. § 5305. Under the Act, Article III judges receive a stated compensation, "as adjusted by § 461 of" Title 28 (28 U.S.C. §§ 5, 44, 135). Section 461 of Title 28 provides that said adjustment shall be "equal to the percentage of such salary rate which corresponds to the overall average percentage of the adjustments in the rates of pay under [the General] Schedule."

Notwithstanding this statutory entitlement, the Congress has repeatedly refused to permit Article III judges to receive the statutory pay adjustments. Although the Judiciary did receive an approximate 5% increase effective October 1, 1975, for the fiscal year 1976, the corresponding adjustments due for the fiscal years 1977, 1978 and 1979 were not paid, because the Congress enacted legislation prohibiting the use of any funds to pay the increases to which the judges were entitled. And for the fiscal year 1980, the increase of approximately 12.9% that otherwise would have gone into effect on October 1, 1979, was reduced from 12.9% to 5.5%.

This failure to accord Article III judges the salaries to which they are otherwise entitled by express statutory provision goes to the heart of the purposes of the Compensation Clause. As was noted by Senator Hruska in the Senate debate on the appropriations restriction which precluded the use of funds to pay the fiscal year 1977 statutory increase:

> "Mr. President, we in the Congress have a heavy responsibility to maintain a high degree of quality and competence in our Federal judicial system. As a member of the Committee on the Judiciary I have been active in the confirmation hearings of hundreds of Federal Judges, nearly 300 in number in the last 7 years alone.
>
> "I have had occasion to consider the history and record of judicial nominees and to question these highly qualified and distinguished lawyers about their backgrounds and abilities for sitting on the Federal bench. I have been impressed with the success and

reputation that these men enjoy throughout the legal community and in their individual States and even nationwide. They generally come [to] the Federal bench, leaving successful and lucrative law practices. Most of them take significant income reductions when they accept appointment to the bench. It is well known that lawyers of the skill and experience we want on the Federal bench can command income far in excess of the current judicial salaries.

"If, however, we keep the salaries at their present levels, we can anticipate a reduction in the quality of our judges. We will get what we will be willing to pay for.

* * * *

"* * * Since November of 1973, eight judges with lifetime tenure have resigned, to return to private life, and some specifically stated that the reason for their decision was the freeze on salaries.

* * * *

"If it is the judgment of Congress that they do not want to face the responsibility of increasing their own salaries, that is fine. But we should confine our debate to congressional salaries and not seek to enlarge the company that is suffering misery" (122 Cong.Rec. 29133 (1976)).[3]

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[3]As pointed out by a recent commentator:

"The decline in the station in life and the prestige of federal judges thwarts one of the main goals of the Framers in establishing a federal judiciary: that of attracting the finest possible legal talent to serve on the bench" (Rosenn, The Constitutional Guarantee Against Diminution of Judicial Compensation, 24 UCLA L.Rev. 308, 336-337 (1976)).

SUMMARY OF ARGUMENT

The Government's novel contention that direct diminutions in judicial compensation are not prohibited by the Compensation Clause of Article III unless they can be proved to be a discriminatory attack on the Judiciary, is without support in history or authority. From the inception of the Constitution it has been the unquestioned understanding that such reductions do by their very nature carry with them an unacceptable potential for undermining judicial independence, as well as for subverting the permanence of judicial tenure guaranteed by Article III.

The Government's "discrimination" argument seriously underestimates the difficulty of assessing legislative motive in these cases. Moreover, the decisive issue so far as the purposes of the Compensation Clause are concerned is not whether the Congress can be demonstrated in fact to have acted with a discriminatory purpose, but whether a judge might curb his judicial independence in the fear that it had done or might do so.

In addition, the Government's argument ignores the necessity to isolate judges from political influences affecting their salaries. The basic reason for the failure to accord judges the statutorily promised cost-of-living increases during the four fiscal years in question has been political, arising from the fact that the members of Congress "linked" judicial salaries to their own, and felt unable for political reasons to vote themselves a pay increase. Such dependence on purely political considerations for the receipt of their prescribed compensation exposes Article III judges precisely to those influences

that it was the purpose of the Compensation Clause to prevent.

There is likewise no basis for the Government's reliance on decisions sustaining the imposition of nondiscriminatory income taxes, applicable to all citizens generally, on judicial salaries, or holding that the failure of the Congress to enact a statutory increase in the face of inflation does not in itself amount to a diminution in judicial compensation. As Justice Holmes explained in *Evans* v. *Gore*, 253 U.S. 245 (1920), although there is no reason "for exonerating [a judge] from the ordinary duties of a citizen," the Framers had "very good reason for preventing attempts to deal with a judge's salary *as such*" (253 U.S. at 265) (dissenting opinion) (emphasis supplied).

ARGUMENT

A. There is no support in history or authority for the assertion that only "discriminatory" diminutions in compensation are prohibited by the Compensation Clause.

In *Evans* v. *Gore*, 253 U.S. 245 (1920), this Court recognized that all legislative actions which "withhold or take from the judge *a part of that which has been promised by law for his services* must be regarded as within the prohibition" (253 U.S. at 254) (emphasis supplied).[4] Mani-

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[4]Although Justice Holmes' dissent in *Evans* is now generally accepted as a correct statement on the specific question of the validity of imposing a generally applicable income tax on judicial salaries, the Court's exposition of the background and purposes of the Clause enunciated "principles that continue to be valid" (*Atkins* v. *United States*, 556 F.2d 1028, 1043 (Ct.Cl. 1977)), as recognized by the Brief for the United States in this action (pp. 61, 67).

festly, this refers to a withholding of a prescribed statutory adjustment as well as to a reduction in the existing level of pay. As Hamilton explained in the Federalist, the decision to permit increases, but not decreases, in the compensation of the Judiciary was intended to "leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation" (The Federalist, No. 79, p. 532 (Cooke Ed. 1961)).

Notwithstanding these familiar and established principles, the Government, for the first time in its history, advances in these cases the contention that direct diminutions in judicial compensation are not prohibited by the Compensation Clause unless they can be shown (presumably by the judges) to be "a discriminatory attack on Article III judges * * * done with the purpose or effect of undermining their independence" (J.S., p. 3). Accompanying this novel contention is a suggestion that there is little danger that the independence of Article III judges will be undermined so long as salary diminutions do not "discriminate" against the Judiciary. This suggestion seriously underestimates the difficulty of assessing legislative purpose in cases such as these. Moreover, it ignores the necessity to isolate judges from political influences affecting their salaries, and it attempts to engraft a novel concept without support in history or authority which would completely undermine the Compensation Clause or

at least limit it to the narrowest possible compass, contrary to this Court's admonition that it should be interpreted "not restrictively, but in accord with its spirit and the principle on which it proceeds" (*Evans* v. *Gore*, supra, 253 U.S. at 253-254).

From the inception of the Constitution, it has been the uniform understanding both of the Congress and of this Court that all direct reductions in the judicial compensation prescribed by statute are prohibited, without any necessity for proof of discrimination against the Judiciary or that such legislation has the specific purpose or effect of undermining judicial independence. The Compensation Clause of Article III represents the determination of the Framers that such reductions *do by their very nature* carry with them an unacceptable potential for undermining judicial independence and, of equal importance, for subverting the permanence of judicial tenure by promoting judicial resignations and refusals of service. As a leading commentator pointed out, after comprehensive review of the cases:

> "Obviously, any direct reduction in the salary of a federal judge belonging to the courts which are authorized and therefore protected by Article III of the Constitution would be invalid, and none has been attempted. The principal constitutional issue arising out of the diminution clause has had to do with the propriety of applying a general income tax to judicial salaries * * *" (Fellman, The Diminution of Judicial Salaries, 24 Iowa L.Rev. 89, 93 (1938)).

It was pursuant to this uniform understanding that the Congress, when it became necessary in the Depression to adopt broad economy measures reducing the salaries of a

wide range of Federal employees, expressly exempted from an otherwise nondiscriminatory salary reduction "judges 'whose compensation may not, under the Constitution, be diminished during their continuance in office'" (*O'Donoghue* v. *United States*, 289 U.S. 516, 529 (1933), construing 47 Stat. 382, 402).

In subsequent legislation, the Congress attempted to apply such reductions to retired Federal judges on the assumption that they were not protected by the Clause (48 Stat. 283, 307). In *Booth* v. *United States*, 291 U.S. 339 (1934), this Court held, to the contrary, that a retired judge was protected by Article III of the Constitution, and further, in accordance with the Solicitor General's concession, that Article III protected a retired judge from a reduction in his salary below the level to which it had been increased following his appointment, even though the reduced level exceeded that in effect at the time he took office. As the salary reduction in question was part of a general nondiscriminatory economy measure necessitated by the extreme economic circumstances of the time, no such concession of unconstitutionality would have been tendered or accepted by the Court had there been any thought or understanding that the Compensation Clause prohibited only salary reductions discriminating against the Judiciary.

The understanding that the Compensation Clause prohibits *all* direct diminutions in judicial compensation, regardless of any evidence of discrimination against the Judiciary, is incorporated in the Executive Salary Cost-of-Living Adjustment Act itself. Because its provisions

for annual adjustments could produce salary decreases as well as salary increases, that Act specifies that the adjustments it prescribes

> "* * * shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office" (28 U.S.C. § 461).

The Government attempts to find support for its new construction of the Compensation Clause in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), which upheld the imposition of a generally applicable income tax to the salary of a judge appointed after the date of its enactment, and in the recent decision of the Court of Claims in *Atkins* v. *United States*, 556 F.2d 1028 (Ct.Cl. 1977), certiorari denied, 434 U.S. 1009 (1978), refusing to hold that the Congress' failure to enact any salary increases for the Judiciary between 1969 and 1975 in and of itself violated the Compensation Clause because of the diminution in compensation that the judges had experienced as a result of the effects of inflation (Br. of Appellant, pp. 62-67). Neither *O'Malley* nor *Atkins* has any relevance to the issue presented here.

In *O'Malley* this Court made clear that its concern was not with any effort directly to reduce the compensation of the Judiciary, but solely with the question of whether it was a violation of the Clause to charge judges with one of "the common duties of citizenship" by imposing a generally applicable income tax on the salaries they had already received. The Court concluded that "[t]o subject them to a general tax is merely to recognize that judges

are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of government whose Constitution and laws they are charged with administering" (307 U.S. at 282).

In *Atkins*, the Court of Claims applied *O'Malley* to allegations that the effects of inflation alone imposed a duty on the Congress to enact a salary increase. As the court stated:

> "What *O'Malley* did add to the body of learning on the Clause was that nondiscriminatory actions of Congress, those affecting the public generally, though indirectly bringing about the lowering of judges' 'take-home pay,' would nevertheless pass muster under the Clause" (556 F.2d at 1045).

Further,

> "*O'Malley* rejected the contention that a diminution of purchasing power by virtue of income taxation violated the Compensation Clause, stating that [an] economic burden placed nondiscriminatorily upon the public generally afforded judges no cause to complain under the Constitution. Inflation generally experienced by the public is just such a nondiscriminatory burden" (556 F.2d at 1047).[5]

The instant case, however, does not involve an indirect reduction in judicial salaries as the result of the imposition of an income tax applicable to the public generally

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[5]The *Atkins* court did not, however, reject the contention that inflation could under some circumstances, if sufficiently severe, in and of itself impose a duty on the Congress to enact salary increases for the Judiciary: "Certainly, were Congress not to budge on the nominal dollar salaries it allowed judges in the face of hyperinflation, while the earnings of most others rose in rough

as one of the "common duties of citizenship," nor does it involve the scope of the Congressional duty in the first instance to enact salary increases for the Judiciary to take account of "inflation generally experienced by the public." Instead, it involves a direct diminution of the level of judicial compensation already statutorily prescribed. This reduction is not broadly applicable to the public in general, or even to the majority of Government employees, but is limited solely to members of Congress, the Judiciary, and a small number of high-level executive employees.[6] The Government's contention that Article III judges "too, are high-ranking public officeholders who should not be exempted • • • from the responsibilities and obligations [i.e., the pay cuts] that Congress • • • has imposed on all other leading government officials" (Br. of Appellant, p. 65) simply ignores the *special* Constitutional protection which the Framers explicitly provided for the compensation of the Judiciary, and not for that of other high-level officials.

When considering phenomena that were far removed from the concerns of the Framers, such as a generally

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parity with the cost of living, the threat to the ability of the judges to stay in their posts would be so great that a demand for their relief under article III would be difficult to refute" (556 F.2d at 1054). In view of the recent acceleration in the rate of inflation, and the continuing failure of the Congress to permit judicial salary increases, this situation hypothesized in *Atkins* is no longer remote from consideration.

[6]Even if the Government's discrimination contention were acceptable, it might still be questioned whether a decrease in salary applicable to this small group, but not to the great mass of Government employees generally (as in the *Booth* case), is nondiscriminatory, particularly since political considerations motivate predominantly in the small group.

applicable income tax, courts have quite properly been concerned to require some substantial showing that the practical impact of such general burdens of citizenship will frustrate the purposes of the Compensation Clause, for "[t]o require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge" (*Evans* v. *Gore*, supra, 253 U.S. at 265) (Holmes, J., dissenting). But the Framers had a different view of direct reductions in judicial salaries already prescribed by law: they concluded that such reductions have an obvious potential for deleterious impact both on the independence of the Judiciary and on the ability to attract persons of high quality to the bench and to maintain them there. When they enacted the Compensation Clause, the Framers chose to guard against these prospects by clearly condemning any diminution in the compensation promised to judges by law, whether accompanied by proof of discriminatory motive or not. Again, to quote Justice Holmes' dissent in *Evans*, while there is no reason "for exonerating [a judge] from the ordinary duties of a citizen," the Framers had "very good reason for preventing attempts to deal with a judge's salary *as such*" (253 U.S. at 265) (emphasis supplied).

B. A requirement of proof of "discrimination" or legislative purpose to attack judicial independence would frustrate the purposes of the Compensation Clause.

To confine the prohibition against diminution of judicial compensation solely to cases in which proof of actual discriminatory animus or legislative purpose to undermine judicial independence could be presented would deprive the

Compensation Clause of its force and disregard its broad protective purposes. Proof of legislative motive adverse to the Judiciary would be impossible in the ordinary case. For example, although the Government argues in the instant case that "there is no evidence whatever that the Acts were prompted by Congress' antagonism against the judiciary or its displeasure with any particular federal judges or judicial decisions" (Br. of Appellant, p. 64), it is interesting to note that Representative Udall, in advocating that the restriction on the use of fiscal year 1977 appropriations be extended to the Judiciary, argued on the floor of the House that any other position would mean that "it is lovely for the members of the appellate courts and the district courts, judges that some of my friends do not like because of their busing orders, it is great to give them a pay increase * * *" (122 Cong.Rec. 28873 (1976)).

The decisive issue is not whether the Congress can be demonstrated in fact to have acted with a discriminatory animus, but whether an Article III judge might curb his judicial independence in the fear that it had done or might do so. As this Court pointed out in *Evans* v. *Gore*, supra, the Compensation Clause guarantees that "the judge shall have a sure and continuing right to the compensation, whereon he may confidently rely for his support during his continuance in office, so that he need have *no apprehension* lest his situation in this regard * * * be changed to his disadvantage" (253 U.S. at 249) (emphasis sup-

plied). And in *O'Donoghue* v. *United States*, supra, this Court added:

> "The power to diminish the compensation of the federal judges was explicitly denied, in order, inter alia, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support" (289 U.S. at 531).

Moreover, the Government's argument on "discrimination" ignores the actual facts that underlie these cases. The reason that Congress has attempted to prevent the use of funds to pay the statutory rates of pay to the Judiciary in the last four fiscal years has been fundamentally political. In recent years, the members of Congress have adhered to the theory that judicial salaries should be "linked" to their own. As the 1976 Report of the Commission on Executive, Legislative, and Judicial Salaries noted in recommending very substantial increases for the Federal Judiciary beyond those ultimately submitted to and approved by the Congress in 1977:

> "On September 22, 1976, Congress acted to deny a small upward salary adjustment to the top employees of all three branches of the Federal Government, an adjustment which reflected a percentage increase based upon a comparability study with the General Schedule and which would have occurred automatically had Congress not voted affirmatively to deny it" (Comm. Print No. 94-27, 94th Cong., 2d Sess., p. 12).

The Report observed that the members of Congress did not wish to deny themselves, Federal judges and high-level executives a pay raise, but

> "* * * they also knew, better than anyone else in government, the mood of America, and they knew that the consequences in November for any Congressman who voted himself a pay raise in September—however justified—would be paid at the ballot box" (id., p. 17).

The Report concluded that:

> "[t]here is no historic linkage among [Congressional and judicial salaries], and we cannot find a persuasive rationale for its rigid application. The basis since 1969 has apparently been largely political, based on the assumption that the Circuit Judges and the Level II executives might serve as a 'lifeline' to the Members of Congress, understandably unwilling to raise their own pay unilaterally. But as the public mood has intensified, the lifeline has disappeared, and it is Congress which has served as an anchor over the past eight years, dragging down the 'links' and preventing any increase anywhere" (id., p. 33).[7]

The concept of "linkage" as a means of setting judicial salaries, which has resulted in four successive Congressional failures to fund statutorily prescribed rates of pay for the Judiciary, has subjected the Judiciary to the same sorts of partisan and political considerations that

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[7]The Report continued that "[t]here are, in fact, sound reasons for unlinking Congress, Level II * * * and any of the Federal judges. Not only are these, of course, entirely different jobs with entirely different responsibilities, but the career anticipation patterns vary sharply. * * * The judge * * * has not made a decision to enter government for only a few years, and therefore, to accept

have prevented the members of Congress from increasing their own pay. "Linkage with congressional salaries exposes judicial salaries to the same fear of adverse voter reaction that Congress has about raising its own salaries during an inflationary period" (Rosenn, supra, 24 UCLA L.Rev. at 340, n. 127 (1976)). The entanglement in and dependence of the Judiciary on political considerations for the receipt of its prescribed compensation must inexorably undermine the very independence which it was the purpose of the Compensation Clause to ensure. As John Marshall once observed:

> "The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?" (quoted in *Evans* v. *Gore*, supra, 253 U.S. at 250).

And, at a later time, a noted student of our political system, subsequently the President of the United States, noted the indispensable requirement that the Judiciary be removed from the political arena:

> "Our courts are the balance-wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. * * * It is clear

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a slightly lower salary for that period of service; but has on the contrary elected a permanent change, not only in earnings but in life style as well. If, as is customary, the judge is selected from those successful at the bar, the current assumption is that the trade-off for the judicial life, with the nonmonetary satisfactions it affords, is a heavy reduction in dollar earnings—for all of the remaining productive years. That factor alone suggests unlinking the two" (ibid.).

> beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some *non-political forum* in which those understandings can be impartially debated and determined. That forum our courts supply" (Wilson, Constitutional Government in the United States, quoted in *Evans* v. *Gore*, supra, 253 U.S. at 251) (emphasis supplied).[8]

The Government's restrictive reading of the Compensation Clause also overlooks the fact that ensuring judicial independence was not its only purpose. The protection it provides is also essential to attract to the bench and to retain the few persons in society of sufficient integrity,

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[8]Compare with these profound observations the nature of the considerations that have underlain the appropriations restrictions in the instant case. For example, in the debates on the fiscal year 1979 legislation, Representative Pattison of New York observed:

> "Make no mistake, I have no objection to saving the taxpayers' money and setting an inflation-fighting example. My concern is that we are doing the right thing for the wrong reason.
>
> "What we are seeing here today is not an analytical assessment of what should be the proper level of compensation for service in the Government. Nor is it a carefully measured blow aimed at the heart of the inflation problem, although it is not a bad first step. No, what we are witnessing today is a stampede, a mob of politicians fleeing for cover" (124 Cong.Rec. H5510 (daily ed. June 14, 1978)).

The New York Times editorial of November 19, 1976 observed:

> "Several factors account for this Congressional penny-pinching. On the part of some members there is a covert hostility to-

skill and wisdom properly to discharge the vital judicial function. As Hamilton pointed out in The Federalist:

> "There is a further and a weighty reason for the permanency of the judicial offices; which is deducible from the nature of the qualifications they require. • • • [T]here can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. • • • [A] temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity" (The Federalist, No. 78, supra, pp. 529-530; see also *Evans* v. *Gore,* supra, 253 U.S. at 253-254).

Even prior to the four successive recent Congressional salary restrictions, the failure of Congress for six years to enact any salary increases for the Judiciary caused Senator McGee to observe in 1975 that "the pay of Federal judges—men and women who stand as the central figure[s] in the administration of justice in this country—is encouraging more resignations now than at any

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ward Federal judges for what is deemed their excessive liberalism • • •.

• • • • •

"The strongest reason for Congress's Scrooge-like attitude, however, is a failure of political nerve. Members of Congress are reluctant to pay other Federal employees substantially more than they are paid themselves, and they lack the courage to vote themselves salary increases."

time in our history" (121 Cong.Rec. 25375 (1975); see also 120 Cong.Rec. 5095, 5104 (1974)). The recent attempted salary reductions have compounded this tendency. In 1976, the Quadrennial Salary Commission pointed out that "there are some facts worth keeping in mind on the growing importance of compensation (or rather the lack of increased compensation in a highly inflationary period) in accelerating departures from something even as prestigious and satisfying as the Federal bench" (Comm. Print No. 94-27, 94th Cong., 2d Sess., p. 39) and that "the strains of the past seven years are beginning to show" (id., p. 51; see also Rosenn, supra, 24 UCLA L.Rev. at 336-337 (1976)).[9]

It is one thing to hold, as in the *Atkins* case, that there is no obligation to increase compensation to levels not previously established because of the effects of inflation, at least absent a demonstration of "hyperinflation" or a "mass exodus" of judges from office (556 F.2d at 1054, 1055). It would be quite another to import into the Compensation Clause for the first time a requirement of a showing of discriminatory animus when the Congress acts to reduce judicial salaries previously established. Such refusals to pay the stated rates of judicial pay, if sustained, must

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[9]In his Message to Congress recommending the approximate 28% increase received by district judges in 1977 pursuant to the provisions of the Federal Salary Act of 1967, the President noted that the "Quadrennial Commission determined that a 50% increase in Executive, Legislative, and Judicial pay would have been justified by economic indicators," and that "as a result of frozen compensation schedules, a number of Federal Judges have left the bench to return to private law practice, and the Chief Justice has reported to me that others are planning to do so. This represents an alarming loss of talent and experience" (13 Weekly Comp. Pres.Docs. 50).

inevitably adversely affect those considering whether to accept a judicial appointment or to resign from the bench, for those decisions would be made with the knowledge that the Congress' express statutory provision for fixed adjustments in judicial compensation is an empty promise, subject always to overriding political considerations.

CONCLUSION

For the reasons stated, the judgments of the district court should be affirmed.

Respectfully submitted,

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UNITED STATES OF AMERICA,

Appellant,

VS.

HUBERT L. WILL, ET AL.,

Appellees.

On Appeals from the United States District Court
for the Northern District of Illinois

BRIEF AMICUS CURIAE OF THE CHICAGO BAR ASSOCIATION SUPPORTING APPELLEES

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Nos. 79-983 and 79-1689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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SUMMARY OF ARGUMENT

> The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Article III, section 1, United States Constitution.

The purpose of the prohibition against diminutions of federal judges' salaries contained in Article III, section 1, was to prevent judges from being tempted to favor Congress in deciding cases, as much as it was to prevent Congress from punishing judges for decisions not to its

liking. This guarantee was devised for the protection and benefit of the public, not for the private welfare of a particular judge. The rule proposed by the Government in this case, that diminutions in compensation of federal judges be permitted because the compensation of a few other federal employees was diminished as well, entirely ignores this purpose. For, whereas Congress might find it difficult to punish the judiciary in a statute lowering the salaries of a large number of federal officers, the temptation to judges to seek an exemption from such legislation is not lessened by the inclusion of other federal employees. That this temptation is unavoidable to some degree because of Congress' authority to *increase* judges' compensation does not refute that the Framers intended to eliminate the temptation in the circumstances far more to be feared: where compensation was being *diminished.*

It is incorrect to limit the protection of Article III, section 1, to merely the salary presently received by a federal judge. The term "compensation" extends to a formula as well; specifically, to a cost-of-living adjustment. The entitlement to such an adjustment vests with the statute's enactment, and cannot be taken away upon the payable date of each annual adjustment. To limit "compensation" merely to cash in hand prevents the Congress from ever guaranteeing a cost-of-living adjustment in a certain enough way to attract qualified attorneys to become judges. It also belies the expressions of the Constitutional Convention, and the experience of the Framers with inflation. Judges who give up the private practice of law also give up the ability to adjust with inflation so as to guarantee the steady value of their earnings. The cost-of-living adjustment scheme at issue here was itself inadequate to prevent diminutions in real compensation of the order of 21% to 32%. Yet, denied its benefit, judges' salaries have declined in real terms

by 35% to 44% since 1968. Whether or not Congress was obliged to provide a cost-of-living adjustment scheme to federal judges, it has in fact done so; and to allow a later Congress to withhold the payments under that scheme denies to every Congress the authority to make part of undiminishable Article III compensation whatever a particular Congress might deem necessary to attract and retain quality judges.

INTEREST OF AMICUS CURIAE

> He has made judges dependent in his will alone, for the tenure of their offices, and the amount and payment of their salaries.

The Declaration of Independence.

> I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.

John Marshall, *Debates of the Virginia Convention, 1829-1831*, 619.

> In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the Judicial from the Legislative power, in any system, which leaves the former dependent of pecuniary resource on the occasional grants of the latter.

Alexander Hamilton, *The Federalist*, No. 79 (Scott, ed., 1894) 431.

> In the past ten years the lot of judges has not been easy. Although burdens became heavier and costs of living increased dramatically, Congress failed to provide needed judgeships and fell far short of maintaining a level of compensation called for by inflation, as

> was done with virtually all other personnel of the federal establishment.

The Chief Justice, *Annual Report on the State of the Judiciary—1980,* 66 A.B.A. Journal 295, 299 (March, 1980).

The Chicago Bar Association is the largest voluntary-member metropolitan bar association within the United States. Its members practice before every federal bar; and strive to uphold the highest principles of conduct in the legal profession.

> The purposes and objects of this Association are: to establish and maintain the honor and dignity of the profession of the law . . . to increase the usefulness of the legal profession in promoting the due administration of justice and the public good . . . .

Article II, Articles of Incorporation of The Chicago Bar Association (As Amended, June 1977).

That federal judges be unbiased is an absolute prerequisite to the task mutually assumed by courts and counsel that justice be done. That federal judges in addition be drawn from the very highest quality of counsellors is greatly to be desired, for the good of our country, our clients, and our profession.

The present matter before the Court implicates these concerns to the highest degree. The Government has urged certain positions upon this Court that are most troubling, in that, we believe, they would prevent the Congress from taking those steps necessary for the attraction and retention of the highest caliber of federal judge.

Amicus curiae affords the point of view of the practitioner before the federal courts; a point of view removed

from any hope of personal pecuniary gain;[1] and removed as well from any constraints the appellee-judges themselves might feel not to overstate the importance of their own positions. In point of fact, however, it is difficult to overestimate the importance of a high quality, totally independent federal judiciary to our Constitutional scheme.

By vote of its Board of Managers, the Chicago Bar Association resolved to seek leave to file a brief *amicus curiae* in these appeals. *Amicus* supports the position of appellees in these cases. Consent to the filing of this brief has been obtained from the Acting Solicitor General and from the attorneys for appellees.

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[1] The judges who brought this cause of action were the only parties with standing to raise the serious constitutional questions at risk. Their decision to press this litigation, at risk of embarrassment to themselves and their brothers, must be admired as an exercise of their high obligation to resist all encroachments upon the independence of the judiciary, for the benefit of all citizens.

"In the light of the foregoing views,—time honored and never discredited—it is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation, not for his private advantage—which, if that were all, he might willingly forego—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people. . . . The judges of the Court of Appeals of Virginia, as far back as 1788, in discharge of the same duty, directed to the members of the state assembly a 'respectful remonstrance' against an act which had the effect of reducing their compensation. 4 Call (Va.) 135, 141. . . .

"Actuated by like considerations of public duty, as it is averred, these plaintiffs brought the present suits." *O'Donoghue* v. *United States,* 289 U.S. 516, 533-534 (1933).

ARGUMENT

1. Neither precedent nor practicality support Appellant's rule that diminutions in judicial compensation be permitted unless proven to be discriminatory.

Because of the colonial experience, a large amount of the historical material bearing on Article III, section 1, is concerned with preserving federal judges from an undue dependence upon the Congress. The Constitutional Convention debates themselves dwell on the possibility that a federal judge would be untowardly sympathetic to Congress while a bill to reduce judges' compensation was pending in Congress. M. Farrand, *The Records of the Federal Convention of 1787,* volume 2 (1966), at 45 (remarks of James Madison, July 18, 1787).

Commentary at the time the Constitution was being considered by the several states brought up the additional concern that the Congress be prevented from punishing federal judges, in particular or in general, by reducing their compensation.

> [T]he Judiciary is, beyond comparison, the weakest of the three departments of power; . . . it can never attack with success either of the other two; and . . . all possible care is requisite to enable it to defend itself against their attacks.

The Federalist, supra, No. 78 (Hamilton).

> It was therefore necessary to leave it to the discretion of the Legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of the body to change the individual for the worse.

The Federalist, supra, No. 79 (Hamilton).

It is important to observe that the historical discussion focused upon two separate fears: first, that judges would

try to curry favor with Congress by favorable rulings; and second, that Congress might try to punish judges by lowering their compensation. Only the second rationale receives any treatment in the Government's brief. Indeed, the Government would permit Congress actually to *lower* the compensation of federal judges, so long as the compensation of some other federal officials was lowered at the same time. (Brief of the United States at 67, n. 55).[2] In such a setting, the Government argues, there would be no attempt by Congress to punish federal judges.

Whatever other weaknesses this novel argument might have (such as an undisguised alteration of the plain meaning of the Constitution), it cannot be said to reflect adequately the first set of concerns of the Constitution's framers. For, even if all other federal officials were included in the reduction, a judge or Justice might hope to win an exemption for judicial salaries in the legislation, and to that end, might be tempted to favor Congress or one of its statutes when it arose for construction or review.[3]

It might be responded that the same temptation exists when an increase in compensation is under consideration;

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[2] One difficulty with the Government's position is that it cannot specify how large the group, including judges, must become, to avoid constitutional condemnation. In the present case, the group of federal employees whose compensation has been diminished is quite small; only executive schedule employees and congressmen are included with the judges. This is a miniscule proportion of the total number of federal employees.

[3] Precisely such an exemption was granted in the general compensation reduction laws of the Depression-era, *see, e.g.*, 47 Stat. 382, 402 (1933), and again in 1975, when judges were exempted from any downward revisions ordered for all federal employees under the Comparability Act, 28 U.S.C. § 461(b). These exemptions, of course, occurred because Congress had no choice, and not because Congress had been successfully lobbied.

and that is true. For precisely that reason, Madison sought to ban increases as well as diminutions in compensation. Madison's original draft read just that way. It was amended to allow for increases that inflation, a rising standard of living, and a growing workload would require.

But *the ban on diminutions, which Madison thought were more to be feared, was maintained* for the reasons Madison suggested. *See* M. Farrand, *supra,* at 44-45. The final phrasing was the result of this compromise.

Now, the Government looks at the fact that increases are allowed and thereby concludes that the goal of preventing temptation of judges or Justices to favor Congress is not a serious motivation underlying Article III, section 1. Yet that concern remains an important rationale, expressed in the Constitutional Convention itself, for Article III, section 1; and must be taken into consideration in any interpretation of that Constitutional provision. The power to diminish compensation was seen as especially formidable. Hence, the power was removed.

With such an understanding, the Government's position that diminutions in judicial compensation were permissible so long as *some* other federal employees are included as well, is wholly inadequate. Federal judges frequently (almost daily) have the chance to favor the Congressional point of view on the constitutionality or construction of a statute. Motivations for judicial decisions are impossible to probe, and very rarely are reviewed at all. Accordingly, the Constitution simply removed this one area of possible compromise of judicial independence.

Of course there are many laws that might bear indirectly upon the compensation or status of the federal judiciary that are, nevertheless, perfectly constitutional. Congress' powers cannot be so circumscribed as to require an investigation of what impact might be felt on federal judges of

every statute, no matter how remote, in order to prevent the judges' being tempted. The appropriate line was drawn by Justice Holmes, dissenting in *Evans* v. *Gorc,* 253 U.S. 245 (1920), the same source relied on by the government for its rule:

> The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the Federalist (No. 79), that "a power over a man's subsistence amounts to a power over his will." *That is a very good reason for preventing attempts to deal with a judge's salary as such,* but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge.

Id. at 265 (emphasis added).

The Government looks only at the last sentence of this quotation, and not Justice Holmes' context, which concerned statutes other than those dealing "with a judge's salary as such." When statutes "dealing with a judge's salary as such" are at issue, the Constitution's prohibition against any diminution is absolute. *Cf., Atkins* v. *United States,* 556 F.2d 1028, 1045 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978). The Congressional action under consideration in this case *did* attempt to deal with a judge's salary, as such. And that action must be resisted, or the insulation of judges from the temptation to favor their paymaster, the Congress, will be lost.

The test the government would instead propose, an inquiry into *congressional* motivation, is unresponsive to this entire concern, and is itself, an unworkable and dangerous alternative. In the words of the American Bar Association, the government test is a "novel concept without support in history or authority which would completely undermine the Compensation Clause . . . ." (Brief of the American Bar

Association as *amicus curiae* at p. 8-9). The Government's innovation is an incomplete and unsatisfactory substitute for the Constitution's own protections.

2. "Compensation" was intended, and for practical reasons should be construed, to include a cost-of-living adjustment if Congress enacts such an adjustment.

The discussion so far has centered on the two rationales for Article III, section 1 based on preserving an independent judiciary: removing from judges the temptation to seek favors from Congress where their "salary as such" was at issue, and preventing retaliation by Congress against judges. A critical third rationale was also involved in the provisions for federal judges set forth in Article III, section 1. That rationale was to attract and hold the highest quality of candidate for the federal bench.

> The importance of the Judiciary will require *men of the first talents: large salaries will therefore be necessary,* larger than the U.S. can allow in the first instance.

M. Farrand, *The Records of the Federal Convention of 1787*, vol. 2, at 429 (remarks of General Pinkney, August 27, 1787) (emphasis in original).

> The Amount of salaries must always be regulated by the manners & the style of living in a Country.

Id. at 45 (remarks of Gouverneur Morris, July 18, 1787).

> Hence it is, that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the station of Judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller, of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the Government can have no great option between fit characters; and that a temporary duration in office, *which would naturally discourage such characters from quitting a lucra-*

> *tive line of practice to accept a seat on the Bench,* would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.

Alexander Hamilton, *The Federalist,* No. 78 (Scott ed., 1894) 430-431 (emphasis added).

> The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station.

Chancellor Kent, *Commentaries,* volume 1, at 294.

It is impossible to read the debates at the Constitutional Convention, the *Federalist* papers, and other contemporary commentary on Article III, section 1, therefore, without concluding that Article III, section 1, was designed to grant learned candidates the security and compensation necessary to lure them from the private practice of law. And it is also clear, from the citations already provided to the Constitutional Convention debates, that Congress was *expected* to use its power to adjust federal judges' compensation upwards when circumstances required. Benjamin Franklin and Gouverneur Morris argued against prohibiting upward adjustments because of this necessity, which would arise from inflation, a busier caseload, and a growth in the general standard of living in which the judges should share. M. Farrand, *The Records of the Federal Convention of 1787,* vol. 2 (1966) at 44-45.

As true as this observation is, there has always been a problem in reading into it any *obligation* on the part of Congress to adjust judges' salaries upward. The closest

any court has come to such a conclusion was the Court of Claims in *Atkins* v. *United States, supra.* There, one hundred and forty federal district and circuit judges alleged that the one-house veto of recommended pay raises, and Congressional inaction, had effectively caused their compensation to be diminished during the inflationary period from 1969 to 1976. The Court of Claims held:

> Certainly, were Congress not to budge on the nominal dollar salaries it allowed judges in the face of hyperinflation, while the earnings of most others rose in rough parity with the cost of living, the threat to the ability of the judges to stay in their posts would be so great that a demand for their relief under article III would be difficult to refute.

556 F.2d at 1054. The inflation from 1969 to 1974 was not held to be so serious, however, as to evoke upon the part of Congress a positive obligation toward the federal judges.

The unmistakable intention of the draftsmen of Article III, section 1, to induce and retain high quality judges who might otherwise stay in the lucrative practice of law, is not without some expression, however. The interpretation of that constitutional provision can and must borrow from this fact we know about the purposes behind Article III, section 1. Rather than dismiss that knowledge as an unenforceable expression of vague goals, as does the Government's brief in this case, the Court ought to utilize this knowledge in analyzing whether a cost-of-living adjustment plan, once granted by Congress, can vest *as a plan* upon the date of the statute's enactment.

The Government premises a very large part of its constitutional elaboration on the argument that a cost-of-living adjustment plan cannot vest, as such. By contrast, the District Court held that the federal judges became entitled, as part of their compensation, to the cost-of-living adjustment

formula set forth in 28 U.S.C. § 135: "Each judge of a district court of the United States shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), *as adjusted by section 461 of this title.*" (Emphasis added.)

A cost-of-living adjustment formula, set in place in 1975, does not become effective in the Government's view, until October 1 of each subsequent year.[4] But the Government's position is not restricted to the circumstances of this one statute. The Government presents to this Court the argument that no element of compensation vests until it is effective, and that in the context of a cost-of-living adjustment formula, the annual date on which adjustments are payable is the effective date.

The real danger from adopting the Government's argument, therefore, is its necessary implication that Congress can never make part of a federal judge's "compensation," as that term is used in Article III, section 1, an entitlement to a cost-of-living adjustment. If Congress chose to adopt a cost-of-living adjustment formula for federal judges, it could still block the payment of each increase called for by the formula as it came due. That provides no assurance of a cost-of-living formula at all. Yet Article III, section 1, was adopted to provide *assurance* to federal judges:

> A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.

Alexander Hamilton, *The Federalist* No. 79, *supra*, at 432.

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[4] The Government seems not to notice the anomaly of contending that a statute passed in 1975 is not effective until October 1 of each subsequent year, becomes effective on that date *without operation of any other statute*, and then becomes ineffective again until the next October 1.

The Government would prevent Congress from ever placing a federal judge on such sure ground through a promised cost-of-living adjustment scheme. It is ironic, therefore, that the Government accuses the opinion of the District Court in this case of reducing the flexibility of Congress. The only inflexibility imposed by the District Court's opinion here is that which Congress itself has already assumed: that the federal judges were to receive the same percentage salary adjustments as were received by the General Schedule employees, for as long as the federal employees' pay comparability scheme was operative. To adopt the Government's view would remove from the power of Congress the ability to include anything under Article III "compensation" other than the paycheck most recently received by a federal judge.

This is a most unsettling conclusion. If the Court adopts the position urged by the Government, then those frequently expressed purposes behind Article III, section 1, to attract and retain quality judges, will be irreparably disserved. In the private practice of law, an attorney has command over his own business, and if he is able, can take steps to insure that his compensation does not seriously diminish over changing economic conditions. A federal judge, however, may not do that. It is solely for the Congress to see to his compensation.

Nor can we close our eyes to the practical effect of inflation when considering the impact of the rule the Government urges. *Amicus curiae* does not argue that Congress is under any obligation to increase the nominal levels of judges' salaries. *Amicus* does argue, however, that *if Congress decides* that a *program* of cost-of-living adjustments ought to be made part of a judge's Article III compensation, it may do so. And in light of the objective of Article

III, section 1, to induce qualified candidates to foresake the private practice of law, Congress would be well advised to consider just such a step. The 1975 formula was only a half-measure, granting judges not an absolute cost-of-living adjustment, but only as much of an adjustment as the General Schedule employees received. But as much as was granted must be paid.

While discussing these practicalities, it is instructive to look to the economic setting within which Congress acted. In the attached chart (Appendix I), the nominal and real levels of salary for federal district judges are presented for recent years. Assuming the same salary earned in private practice as on the federal bench in 1968, the chart shows how the average private attorney fared over the ensuing years. The results support the conclusion suggested above; in real dollars, the average attorney was well able to keep pace with inflation between 1968 and 1977.[5]

The chart also demonstrates that the salary adjustments called for by the 1975 statute did not result in princely sums: had these adjustments been paid, the judges would still be earning between 21% and 32% less (depending upon the price index used) in real dollars in 1979 than they were in 1968. ($31,494 or $27,043 rather than $40,000).[6]

And, most dramatically of all, the chart shows that in actual fact, federal district judges received in 1979 between

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[5] An attorney who was receiving $40,000 in 1968 was receiving between $39,074 (measured by the wholesale price index) and $42,501 (measured by the consumer price index) in 1977, measuring all sums in constant 1968 dollars.

[6] The government contends that Congress refused to fund one of the adjustments due judges to avoid giving more than what comparability demanded. That is plainly untrue, as the chart demonstrates. Furthermore, all things considered, a federal judge actually must be paid $98,356 in 1980 to be as financially well off as he was in 1970. *U.S. News & World Report*, July 14, 1980, p. 47.

35% and 44% lower salary in real terms than they received in 1968 ($26,086 or $22,399 rather than $40,000).

In this context, is it consistent with the purposes of Article III to rule that, even though Congress wishes and intends to guarantee federal judges a cost-of-living adjustment plan on which those judges can rely as part of their constitutional "compensation," it may not do so?

The framers of Article III, section 1, were well-acquainted with inflation. From 1775 to 1781, the wholesale price level in the United States had risen 188%. The value of currency had declined more than 65%.[7] Stipends fixed in nominal terms evaporated. Complaints were brought in Virginia by both parsons and judges who were paid in paper money. *Remonstrance of the Judges,* 4 Call. (Va.) 135 (1788).

James Madison even proposed to the Constitutional Convention that federal judges' salaries be adjusted according to the value of some commodity of real value, such as wheat. M. Farrand, *The Records of the Federal Convention of 1787*, volume 2 (1966) at 44-45 (reproduced in Appendix II). Madison was suggesting that Congress could do precisely what they have done here: adopt a cost-of-living adjustment formula for federal judges. And he put forward this suggestion as justification for his original draft of Article III, section 1 which barred any increase as well as decrease in compensation.[8]

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[7] *Historical Statistics of the United States—Colonial Times to 1970* (H. Doc. No. 93-78, 1975) (Warren & Pearson wholesale price series).

[8] James Madison was so sure of the adequacy of his wheat cost-of-living adjustment formula that he was willing to ban, as a constitutional matter, all other means for Congress to increase judicial salaries. He could not have been willing to do so if he believed, as the Government would urge, that a cost-of-living adjustment *formula,* once adopted, could not be part of "compensation" under Article III, section 1; for that would provide very little assurance of any compensation adjustment for federal judges.

The evidence is overwhelming that the Constitution's Framers would permit Congress to make a cost-of-living adjustment formula part of the "compensation" that was protected by Article III, section 1.

To the Chicago Bar Association, as *amicus curiae,* this conclusion is of the highest urgency. There are top quality lawyers in our community who would be superb federal judges, but who have declined appointment for financial reasons. And, as the *American Bar Association Journal* has recently noted, resignations have also been common.

> Twenty federal judges have resigned in the past six years, an undetermined number for financial reasons, according to the Federal Judicial Center.
>
> One former federal judge, however, charges the executive and legislative branches of the government with abandoning and "betraying" the judiciary. Thomas Masterson, for seven years a judge in the Eastern District of Pennsylvania until his resignation in 1973, quit "after recommendations for higher judicial salaries were blocked by one political branch or the other." "I had had it," he recalls.

66 *ABA Journal* 19 (January, 1980).

These developments disserve the public, our clients and our profession. Congress, in 1975, took one important step to remedy the problem. It gave to judges and to candidates for the judiciary a cost-of-living compensation scheme; not an overly generous one, but *one* assurance that Congress deemed appropriate and necessary. That *assurance* means nothing, however, if Congress can take it back, or refuse to fund it. The adjustment formula, as a compensation plan, is lost.

That conclusion bears upon all the other motives underlying Article III, section 1, as well; not merely the concern with attracting and retaining quality judges. An adjustment

scheme, if granted, must become a part of undiminishable compensation, for all the reasons that salary itself is. This is a very common-sense conclusion flowing from an awareness of what things matter to an individual's finances in the present times. The Supreme Courts of Delaware and California reached this conclusion without the slightest hesitation in interpreting their own state constitutions.[9] The logic is direct: for whatever reasons the legislature may not tamper with a judge's salary once granted, it may not tamper with a judge's cost-of-living adjustment formula, once granted. And Congress has granted such a formula here.

The essence of the Government's argument in response is that a cost-of-living adjustment is not the same as salary received, for Article III, section 1 purposes. Article III, section 1 may prevent Congress from cutting judges' salaries,[10] but, in the Government's view, it does not keep Congress from rescinding an inchoate right, a benefit promised but not yet enjoyed, for that is no different from an expectancy or hope of some new emolument.

The answer to this position is inextricably immersed in the Constitution itself. Congress was given the power to increase compensation but not diminish it, as the result of the compromise discussed above. It would have been better from a separation of powers viewpoint if Congress could do neither; but increases were a practical necessity and the power to take away was perceived to be the more potentially corrupting. The corrupting element was the fact that a

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[9] *Stiftel* v. *Malarkey*, 384 A.2d 9 (Sup. Ct. Del. 1977); *Olson* v. *Cory*, 26 Cal. 3d 672, 609 P.2d 991, 164 Cal. Rptr. 217 (Sup. Ct. Cal. 1980).

[10] Actually, the Government does not even concede this much, because of its innovative reading of "shall not be diminished" to mean "sometimes shall not be diminished." *See* section 1 of this argument, *supra*.

judge could stand in one financial position on one day, and in a worse one the next day, by Act of Congress. *The Federalist No. 79* (Hamilton), *supra*. That power was too much to give to one branch over another; especially where the judicial branch had, intentionally, been cut off from its principal means of alternative financial reward, the private practice of law.

It is this power to *worsen* a judge's financial position that was absolutely forbidden, and it is this power that the government would now restrict to a very narrow scope: cash-in-hand. *But the protection of compensation from diminution must be as broad as the potential to place judges in a less favorable financial position, for that was the intent of the clause.* And it is simply not true that the financial position of judges can be made worse by Congress only with regard to cash-in-hand.

Consider, as one example, a provision for medical insurance provided for judges by Act of Congress. At any given moment, a healthy judge might not be drawing down his medical expense reimbursement. Indeed, he may never receive any payment at all, if he stays healthy. Payment is contingent on uncertain future events. Yet having the medical coverage *is* a present financial benefit. If it were taken away, a judge might well invest his own funds to obtain similar coverage. Although payments are not presently *received,* the judge has a present benefit from the existence of the scheme, and the assurance it provides. Only a sophist would deny that that benefit is real compensation presently possessed.

It is the same with a cost-of-living adjustment. Many unions will sacrifice salary at a bargaining table to obtain a right to a cost-of-living adjustment. Any long-term employment contract (and a judge's is, designedly, for life)

negotiated in modern times will make some provision for the rising cost-of-living, or implicitly compensate for the absence of one. And, as with the medical benefit, an employee who lacks a cost-of-living adjustment will likely alter his other investments, to the extent he is able, to ward against the contingency of higher living costs.

These are practicalities of the modern economy; not word games played on the phrases "effective," "payable," and "receive[d]." A judge who took office in 1975 accepted a position whose compensation was given as a set sum plus an annual cost-of-living adjustment. That autumn, he received the salary increase called for by that adjustment scheme. At that moment, he may fairly well have felt reassured that, come what may, his salary would be adjusted as were those of the vast majority of federal employees as costs rose. But in October of 1976, he was cut off from the adjustment all those others received. And the same event occurred in October of 1977, 1978 and 1979. Has the judge lost anything that he possessed in 1975? Of course he has. He had been guaranteed an adjustment scheme. But he has it no longer. Each autumn, Congress may or may not adjust his salary. The judge takes his chances as he does with any increase, as judges always have. What, then, remains of the cost-of-living adjustment scheme of 1975? The judge has lost it; and, to the small extent his means will allow, he had better make provision for the contingency of inflation through private investments with individuals, companies or governments who still honor *their* commitments.

It is unrealistic and it is disserving to the Constitution's purposes, to feign the belief that only cash-in-hand is protected by the term "compensation."

3. On the non-Constitutional issues, amicus expresses no opinion.

On the non-Constitutional arguments presented, *amicus curiae* does not take a position. If the present matter can be settled on non-Constitutional grounds, then Article III, section 1, will have been spared a most undermining attack. But if the Constitutional argument must be reached, *amicus* can see only one resolution that does not, quite literally, surrender the financial independence of the federal judiciary. That resolution must be that (even though inflation might not have reached those levels at which an *obligation* devolves upon Congress to adjust federal judges' salaries) where a Congress has deemed it advisable to make a cost-of-living adjustment formula part of compensation, a later Congress, for whatever motive, may not deprive federal judges of the formula already made part of their compensation. Any attempt to do so must be resisted. A contrary holding would deprive Congress of the authority to make a lasting guarantee of the adequacy of compensation that Congress itself may deem necessary to retain good judges.

CONCLUSION

No court has ever held that Congress could diminish the compensation of a federal judge, as such. The Government's attempt to engraft a qualification permitting such diminutions is without support in case law, and directly undermines the Framers' expressed rationale for providing for undiminishable compensation. And the term "compensation" must not be read to mean merely salary received. If it were, a vital tool in the attraction and retention of qualified federal judges would be lost; for, in modern times, it is appropriate for the Congress to take care not only of a judge's stated dollar salary, but also of a judge's legitimate concerns about the pace of inflation. And Congress has chosen to make such provision here. If subsequent Congresses can remove from judges those elements of compensation which they have been given, then Congress has become no different from a despotic King, who "has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

Amicus curiae urges affirmance of the District Court.

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APPENDIX I

	U. S. District Judge Actual Salary	In 1968 Dollars		If Adjusted As Required By Statute			If Appreciated At An Attorney's Rate(C)		
				Nominal	1968 Dollars		Nominal	In 1968 Dollars	
		(A)	(B)	$	(A)	(B)	$	(A)	(B)
1968	$40,000	$40,000	$40,000				$40,000	$40,000	$40,000
1969	40,000	37,960	38,498				42,489	40,322	40,893
1970	40,000	35,838	37,138				45,753	40,993	42,479
1971	40,000	34,361	35,965				49,150	42,221	44,192
1972	40,000	33,264	34,425				51,344	42,698	44,188
1973	40,000	31,315	30,438				54,395	42,584	41,392
1974	40,000	28,219	25,609				57,824	40,794	37,020
1975	42,000	27,149	24,614	$42,000	$27,149	$24,614	64,044	41,398	37,533
1976	42,000	25,668	23,525	44,000	26,891	24,645	69,182	42,280	38,749
1977	54,500	31,289	28,765	58,300	33,471	30,771	74,030	42,501	39,074
1978	54,500	29,078	25,392	61,500	32,812	28,654	N/A	—	—
1979	54,500	26,086	22,399	65,800	31,494	27,043	N/A	—	—

(A) Using Consumer Price Index

(B) Using Wholesale Price Index

(C) Using survey of Attorneys' salaries from Bureau of Labor Statistics (BLS Level V).

N/A Signifies data are not available.

APPENDIX II

Max Farrand, *The Records of the Federal Convention of 1787*, Vol. 2 (1996).

FARRAND AT PP. 44-45 (JULY 18, 1787):

[Mr.] M[adison] moved that the Judges should be nominated by the Executive, & such nomination should become an appointment [if not] disagreed to within . . . . days by ⅔ of the 2d. branch. Mr. Govr. [Morris] 2ded. the motion. By common consent the consideration of it was postponed till tomorrow.

"[To hold their offices during good behavior" & "to receive fixed salaries" agreed to nem: con:]

"In which (salaries of Judges) no increase or diminution shall be made, [so as to affect the persons at the time in office."]

Mr. Govr. Morris moved to strike out "or increase". He thought the Legislature ought to be at liberty to increase salaries as circumstances might require, and that this would not create any improper dependence in the Judges.

Docr. Franklin [was in favor of the motion], Money may not only become plentier, but the business of the department may increase as the Country becomes more populous.

Mr. [Madison.] The dependence will be less if the *increase alone* should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter. If at such a crisis there should be in Court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to suffered, if it can be prevented. The variations in the value of money, may be guarded agst. by taking for a standard wheat or

some other thing of permanent value. The increase of business will be provided for by an increase of the number who are to do it. An increase of salaries may be easily so contrived as not to effect persons in office.

Mr. Govr. Morris. The value of money may not only alter but the State of Society may alter. In this event the same quantity of wheat, the same value would not be the same compensation. The Amount of salaries must always be regulated by the manners & the style of living in a Country. The increase of business can not be provided for in the supreme tribunal in the way that has been mentioned. All the business of a certain description whether more or less must be done in the single tribunal—Additional labor alone in the Judges can provide for additional business. Additional compensation therefore ought not to be prohibited.

On the question for striking out "or increase".

Mas. ay. Cont. ay. Pa. ay. Del. ay. Md. ay. Va. no. N.C. no. S.C. ay. Geo. [absent] [Ayes—6; noes—2; absent—1.] [The whole clause as amended was then agreed to nem: con:]

• • • •

FARRAND AT PP. 429-430 (AUGUST 27, 1787):

Mr. Madison & Mr. McHenry moved to reinstate the words "increased or" before the word "diminished" in the 2d. Sect: Art XI.

Mr. Govr. Morris opposed it for reasons urged by him on a former occasion—

Col. Mason contended strenuously for the motion. There was no weight he said in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries so made as not to affect persons in office, and this was the only argument on which much stress seemed to have been laid.

Genl. Pinkney. The importance of the Judiciary will require *men of the first talents: large salaries will therefore be necessary,* larger than the U.S. can allow in the first instance. He was not satisfied with the expedient mentioned by Col: Mason. He did not think it would have a good effect or a good appearance, for new Judges to come in with higher salaries than the old ones.

Mr Govr Morris said the expedient might be evaded & therefore amounted to nothing. Judges might resign, & then be re-appointed to increased salaries.

On the question

N.H. no—Ct no. Pa no. Del. no—Md. divd Va ay—S.C. no—Geo. abst. [also Masts—N.J. & N—C—] [Ayes—1; noes—5; divided—1; absent—4.]

Mr. Randolph & Mr. Madison then moved to add the following words to sect 2, art XI. "nor increased by any Act of the Legislature which shall operate before the expiration of three years after the passing thereof"

On this question

N.H. no. Ct. no—Pa. no. Del. no. Md ay—Va ay—S. C. no. Geo—abst [also Mas. N.J. & N.C.] [Ayes—2; noes—5; absent—4.]

Supreme Court, U. S.
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Nos. 79-983 and 79-1689

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES OF AMERICA,
Appellant
v.
HUBERT L. WILL, et al.,
Appellees

On Appeals from the United States District Court for the Northern District of Illinois

Brief of Amicus Curiae Los Angeles County Bar Association in Support of Appellees

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Brief of Amicus Curiae Los Angeles County Bar Association in Support of Appellees

INTEREST OF AMICUS CURIAE

Pursuant to the written consent of the parties,[1] Amicus Curiae Los Angeles County Bar Association herewith submits its brief in support of the claims of Plaintiffs/Appellees Article III judges in the instant cases, which were consolidated by order of this Court on June 16, 1980.

The Los Angeles County Bar Association is a voluntary organization of over 16,000 lawyers, judges and law professors in the County of Los Angeles, California. It is the largest regional bar association in the United States and, among

[1] The written consent of the parties are on file with the Clerk of this Court, pursuant to Rule 36.2 of the Rules of the Supreme Court.

voluntary bar associations, is second in size only to the American Bar Association. Since its founding more than 100 years ago, the Association has had as one of its primary goals promotion of the sound administration of justice in the California and federal courts.

The Association has long maintained committees on judicial evaluation and administration, as well as other committees, both standing and special, to secure the highest quality appointments to both the California and federal courts. It has supported various legislative efforts to assure adequate judicial resources in Southern California. Accordingly, the Association has a substantial interest in assuring a just resolution by this Court of a conflict involving compensation paid to federal judges. The Association represents the bar in a metropolitan area which places increasing demands on its courts and judges, and it believes that adequate judicial compensation is vital to attracting the ablest men and women to the federal bench.

The Acts of Congress which are at issue herein have reduced judicial compensation by refusing to fund cost-of-living increases due federal judges. Moreover, the arguments advanced to justify this reduction would permit Congress to refuse to fund other forms of compensation, or any compensation at all. The Compensation Clause absolutely bars such reduction and protects all sitting federal judges from being influenced in their decisions by the possibility of such diminishment in compensation.

SUMMARY OF ARGUMENT

I.

The Association urges that 28 U.S.C. § 455 does not defeat the jurisdiction of this Court.[2] Each of the Justices is a member of both of the classes certified as plaintiffs in these cases, and

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[2] This Court has specifically requested that the parties brief the issue of "the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court." (J.A. 56a.)

therefore would otherwise be disqualified under § 455(b)(4) and (5)(i). However, each sitting Article III judge would be similarly disqualified, either as a class member of the plaintiff classes or as an interested person whose compensation would be affected by the outcome of these actions.

Because all federal courts would be closed to these litigants under strict application of § 455, this Court should apply the "rule of necessity" to hear these actions. That rule, which has been expressly adopted by this Court and was not abrogated by the adoption of § 455, is particularly applicable to cases involving judicial compensation and affecting the separation of legislative and judicial power, which would otherwise escape judicial scrutiny.

II.

The Association also argues that the 1976, 1977, 1978 and 1979 Pay Acts are unconstitutional reductions in compensation due federal judges under Article III.

The four Acts of Congress challenged herein reduce the compensation of Article III judges by denying promised increases which are "compensation" within the meaning of the Compensation Clause. This Court has previously held, and other courts have agreed, that what constitutes "compensation" includes all that is promised to a judge as payment, not merely that which is immediately due and payable. Because the Adjustment Act provides for increases automatically, it provides an upward cost-of-living adjustment as part of "that which has been promised by law for [judicial] services." *Evans v. Gore*, 253 U.S. 245, 253-4 (1920).

Accordingly, Congress' refusal to pay the adjustments which have been promised, and, in the case of the 1979 Pay Act, the refusal to continue to fund an increase which had gone into effect, reduce judicial compensation in violation of Article III. To hold otherwise would threaten the separation of the

legislative and judicial powers which was erected precisely to prevent courts from depending on the Congress for their continued subsistence. This reduction in judicial compensation under the Pay Acts is prohibited irrespective of whether the Congressional acts are found to have discriminated against federal judges or to have undermined judicial independence under the test proposed by the United States. The Government's argument that such reduction does not violate the Compensation Clause unless it "discriminates against Article III judges or undermines their independence" utterly lacks constitutional, historical or precedential support. The Association urges this Court to repudiate any such rule and to affirm the orders of the trial court.

ARGUMENT

I

ANY APPLICATION OF 28 U.S.C. § 455 WHICH WOULD DISQUALIFY THE JUSTICES OF THIS COURT IN THESE CASES WOULD DENY ARTICLE III JUDGES ACCESS TO THE COURTS AND RAISE SERIOUS QUESTIONS REGARDING THE SEPARATION OF POWERS.

The Association adopts the arguments made both by counsel for the United States and counsel for the Article III judges regarding disqualification. Both parties have argued that jurisdiction was properly laid in the district court under the Tucker Act, 28 U.S.C. § 1346 (a)(2) and in this Court under 28 U.S.C. § 1252. They argue further that although the provisions of 28 U.S.C. § 455 would apparently disqualify the district court judge and each of the Justices of this Court, application of § 455 would disqualify all current federal judges. The Association agrees that in such circumstances the district court properly invoked the "rule of necessity" to resolve the issue and that this Court should apply the same principle to these cases.

The Association wishes to add only two points to those raised by counsel for the parties.

First, because salaries for federal judges are defined as the salary set by an annual rate as increased by the Adjustment Act, any decision which determines the effective rate set by the Adjustment Act affects not only those federal judges who are class members, but also all judges appointed after the 1979 Pay Act (Pub. L. No. 96-86, 93 Stat. 656), because their initial salaries are pegged to the adjusted rate. Thus, every sitting federal judge is either a party or has a "financial interest" sufficient to disqualify him or her from these cases under 28 U.S.C. § 455(b)(4) or (5).[3]

Second, this Court may well feel, as did the Court in *Evans v. Gore*, that "we cannot but regret that its solution falls to us." 253 U.S. at 247. But the Association urges that these cases, even more than *Evans v. Gore*, raise issues critical to judicial independence from legislative pressure, no matter from what fiscal or political motivations that pressure comes.[4] If this Court fails to invoke the rule of necessity to retain jurisdiction, and if other federal judges are similarly disqualified, then § 455 would in fact deprive a class of litigants of any judicial forum. By similarly strict application, § 455 could effectively bar resort to the federal courts for virtually all cases under the Compensation

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[3] Thus, the provisions of 28 U.S.C. § 2109 are not available to remedy this Court's lack of a quorum because all of the judges of the appropriate court of appeals—the United States Court of Appeals for the Seventh Circuit—would also be disqualified under § 455(b)(4) or (5).

[4] Such issues have become more frequent subjects of litigation in federal and state courts. *See, e.g., Atkins v. United States*, 556 F.2d 1028 (1977), *cert. denied*, 434 U.S. 1009 (1978); *Foley v. Carter*, Civ. No. 79-3063 (D.D.C. Mar. 24, 1980) appeal pending, Nos. 80-1548, 80-1551 (D.C. Cir. filed May 21, 1980); *Olson v. Cory*, 26 Cal. 3d 672 (1980); *Stiftel v. Malarkey*, 384 A.2d 9 (Del. S.Ct. 1977).

Clause, cases which importantly affect judicial independence.[5] Obviously, § 455 should be construed both to preserve rights of access and this Court's ability to resolve disputes involving the separation of powers.[6]

II

THE 1976, 1977, 1978 AND 1979 PAY ACTS ARE UNCONSTITUTIONAL BECAUSE THEY DIMINISH THE COMPENSATION OF JUDGES IN VIOLATION OF ARTICLE III, SECTION 1 OF THE UNITED STATES CONSTITUTION.

Congress has enacted a compensation scheme for federal judges which provides for an annual salary composed of a base salary determined by the Federal Salary Act of 1967, as

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[5] *See Oestereich v. Selective Serv. Sys. Local Board No. 11*, 393 U.S. 233, 238 (1968). In *Atkins v. United States*, the Solicitor General conceded that such a result would raise serious due process issues. No. 75-1728, Memorandum for the United States at 8, n.5, cited in No. 79-1689, Motion to Affirm 11, n.8. *See also* Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1371-74 (1953); Redish and Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 76-81, 93-109 (1975).

[6] It has been suggested that the duty of a Justice of this Court to sit in cases where he is not disqualified may be "even stronger" than for other judges, both because there is no method to appoint a "substitute" justice and because there is no higher authority to review cases, which may be affirmed by an evenly divided Supreme Court sitting without one of its justices. *Laird v. Tatum*, 409 U.S. 824, 837 (Memorandum of Rehnquist, J. 1972). On at least one occasion, a Justice of this Court reversed his initial decision not to participate in a case in order to make up a quorum. *See North American Co. v. Sec. and Exch. Comm'n.*, 318 U.S. 750 (1943) (Chief Justice Stone took no part in decision on petition for certiorari); 320 U.S. 708 (1943) (four justices having disqualified themselves and no quorum being present, case set on special docket and proceedings postponed to await a quorum); 327 U.S. 686 (1946) (Chief Justice Stone voted with the majority).

increased by the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419 ("Adjustment Act"). That Act, enacted in 1975, provides cost-of-living increases for judges[7] at the same rates applied to General Schedule employees under the Federal Pay Comparability Act of 1970, 5 U.S.C. §§ 5301, 5305-5308 ("Comparability Act"). Yearly adjustments in salaries under the Comparability Act are mandatory, in the absence of a national emergency or economic condition affecting the general welfare. *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 601 (D.C. Cir. 1974). In times of national emergency or economic stress, the President must transmit an alternative plan adjusting salaries. That alternative plan goes into effect unless either House of Congress disapproves the alternative plan within thirty (30) days as defined in the statute. 5 U.S.C. § 5305(c)(2).

For each fiscal year since 1975, General Schedule salaries have been increased as provided for by the Comparability Act. Under the Adjustment Act, those rates are applicable to federal judicial salaries. However, in each fiscal year since 1975 the Congress has refused to appropriate funds for the recommended adjustments to federal judicial salaries. (Brief for United States at 8-13.)

The United States argues that the Legislative Branch Appropriations Acts of 1977 (Pub. L. No. 94-440, 90 Stat. 1439) ("1976 Pay Act"), 1978 (Pub. L. No. 95-96, 91 Stat. 270) ("1977 Pay Act") and 1979 (Pub. L. No. 95-391, 92 Stat. 763) ("1978 Pay Act") and Pub. L. No. 96-86, 93 Stat. 656 ("1979 Pay Act") constitutionally denied Article III judges the annual adjustment accruing to them under the Adjustment Act because: (1) at the time the 1976, 1977, and 1978 Pay Acts

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[7] The Adjustment Act specifically incorporates the requirements of the Compensation Clause by providing that the Act "shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under Section 1 of Article III of the Constitution of the United States, be diminished during such individual's continuance in office."

were enacted, the annual cost-of-living adjustments were not yet part of a judge's "compensation"; and (2) even if the 1976, 1977 and 1978 Acts diminished judicial compensation they, and the 1979 Pay Act, which the Government admits reduced judicial compensation then in effect,[8] were not unconstitutional because they did not discriminate against judges or make inroads upon judicial independence.[9]

The Government's arguments ignore the plain language of the Constitution. Congress is charged with the duty to set judicial salaries. It may set a fixed amount, an automatic formula or a discretionary formula for such compensation. But for no reason, discriminatory or otherwise, does the Constitution allow the *reduction* of a judge's salary during his or her continuance in office. Refusal to fund salary increases which are automatic, in that they are not made subject to Congressional approval or disapproval, is a diminution of salary in violation of the Constitution.

A. Article III Protects A Promised Compensation From Reduction Whether The Compensation Is A Fixed Amount Or Set By A Formula.

The Compensation Clause insulates the judiciary from future retaliation for current judicial actions: no matter how unpopular a decision is, the judge who renders it is secure in his or her position and is protected against reduction of his or her compensation. To that extent, it fulfills Hamilton's scheme:

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[8] Brief for the United States at 13.

[9] The Government also argues that, as a matter of statutory construction, the Pay Acts superseded or rescinded the increases provided for by the Adjustment Act. That argument simply rephrases the question of whether the Pay Acts are unconstitutional under Article III. If Congress is obligated to pay the increases provided under the Adjustment Act, it may neither refuse to appropriate funds nor repeal or rescind the Adjustment Act so as to diminish compensation to sitting federal judges.

> "[W]e can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter." *The Federalist*, No. 79, 531 (J. Cooke ed. 1961).

Since the Compensation Clause is designed to protect against future retaliation, it looks to what has been promised by law, and prohibits reneging on that promise.[10] In reviewing Congressional actions under the Compensation Clause, then, the issue is not whether compensation has "vested" or "accrued," as the Government would have it, but what compensation was promised.

The Court need look no further than 28 U.S.C. § 135 to find the compensation promised to district court judges.[11] That section provides for a salary composed of a base salary, determined under the Federal Salary Act,[12] as annually adjusted by the Adjustment Act: if an annual increase is given to

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[10] In *Evans v. Gore*, 253 U.S. 245, 253-54 (1920), the Court stated:

> "[A]ll [diminutions] which, by their necessary operation and effect, withhold or take from the judge a part of that *which has been promised by law for his services,* must be regarded as within the prohibition. Nothing short of this will give full effect to [Article III's] spirit and principle." (Emphasis added.)

[11] Similar provisions apply to other Article III judges and court personnel: 10 U.S.C. § 867 (Judges of Court of Military Appeals); 11 U.S.C. § 68 (Referees in bankruptcy); 26 U.S.C. § 7443 (Judges of the Tax Court); 28 U.S.C. § 5 (Chief and Associate Justices of the Supreme Court); *id.* § 44 (Circuit judges); *id.* § 173 (Judges, Court of Claims); *id.* § 213 (Judges, Courts of Customs and Patent Appeals); *id.* § 252 (Judges, Customs Court); *id.* § 603 (Director and Deputy Director of Administrative Office of the U.S. Courts); *id.* § 753 (Court reporters, district court); *id.* § 792 (Commissioners, Court of Claims).

[12] Postal Revenue and Federal Salary Act of 1967, Pub.L.No. 90-206, Title II, Section 225(a)-(k), 81 Stat. 642-645, 2 U.S.C. §§ 351-361.

General Schedule employees, as mandated by the Comparability Act, a comparable increase goes into effect for district court judges.

Congress has provided that judicial compensation includes a cost-of-living increase—the "adjustment" is therefore "compensation" within the meaning of Article III. Thus, Congress' refusal to fund those increases is, for constitutional purposes, equivalent to refusal to fund judicial salaries at all.

Furthermore, for the purposes of Article III analysis, the *form* of the promised compensation is irrelevant—whether a fixed amount or an amount set by a formula to determine future salary.[13] The Government's basic argument is that because the formula adopted for judicial compensation depends on a future variable which cannot be determined in advance (the General Schedule salary increase under the Comparability Act), federal judges "have only an expectancy that they will receive the anticipated adjustment." (Brief for the United States at 53.) But the fact that the increases depend on a variable which cannot be determined in advance does not make them any less protected by Article III.

This principle was adopted in the first reported decision under Article III. In that case, the Circuit Court of Appeals for the District of Columbia held that an act of Congress which abolished fees charged by federal justices of the peace violated the Compensation Clause. *United States v. More*, 3 Cranch 159, 160 n. 1 (D.C. Cir. 1803). Congress had established federal justices of the peace in the District of Columbia pursuant to Article III and had provided for their payment by fees paid for services when those services were rendered. Congress then abolished the fee schedule. In a criminal action against a justice of the peace for charging a fee for his services,

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[13] The United States concedes the proposition that there is no meaningful distinction, for purposes of Article III analysis, between a liquidated or sum-certain increase and an increase based on a formula. (Brief for the United States at 55-56 n.1).

the circuit court held that the compensation scheme could not be diminished during the tenure of judges who took office when the schedule was in effect. Therefore, the Act of Congress abolishing the service fees did not affect sitting justices of the peace. The court explicitly rejected the argument that the fees were not within the protection of the Compensation Clause because the time of payment was not stated and held that "if a [federal judge's] compensation has once been fixed by law, a subsequent law for diminishing that compensation (*a fortiori* for abolishing it) cannot affect that [federal judge] during his continuance in office." 3 Cranch at 160 n. 1. In *More*, the judge's future compensation for services was contingent on future performance of services. Whether or in what amount those services were rendered could not be foreseen, just as the amount or existence of Adjustment Act increases cannot be predicted in advance. Yet the court protected the fee schedule in *More* against any future reduction during affected judges' tenure.

A statute analogous to the Adjustment Act and providing for automatic adjustments in salary has recently been reviewed by the California Supreme Court in *Olson v. Cory*, 26 Cal.3d 672 (1980). The California statute governing judges' salaries provided that the base salary of each judge would be increased by the percent increase in the California consumer price index.[14] In 1976, the legislature placed a limit on these cost-of-living increases. Judges and judicial pensioners brought suit to declare the limitation unconstitutional under a section of the California Constitution which provided: "Salaries of elected state officers may not be reduced during their term of office."[15]

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[14] *See* Cal. Gov. Code § 68203 (1976), which, prior to amendment, provided in pertinent part:

> "[O]n September 1 of each year . . . the salary of each justice and judge . . . shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year." (Stats. 1969, ch. 1507, § 1.)

[15] *See Olson v. Cory*, 26 Cal.3d 672, 683-84 (1980).

The California Supreme Court held that the statute setting salaries included annual cost-of-living increases as a part of each salary. Any limit on such increases was held to be a reduction in salary and was therefore unconstitutional.[16] *See also Stiftel v. Malarkey*, 384 A.2d 9, 15-16 (Del. Sup. Ct. 1977) (salary increases made pursuant to a formula cannot be revoked once they are granted to state officers whose salary or emoluments may not be diminished during their tenure).

Like the California statute interpreted in *Olson v. Cory*, the Adjustment Act provides for an automatic annual adjustment of judicial salaries.[17] In *Olson v. Cory*, the increase was set by

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[16] The Government has suggested that this Court "look to the opinion of the California Court of Appeals as the better reasoned and more persuasive discussion." (Brief for the United States at 55 n.47.) However, under well-settled California law, the opinion of the Court of Appeals ceased to have any legal effect when the California Supreme Court granted a hearing to review the decision. The Court of Appeals opinion will not appear in the bound official reports. "The opinion and decision . . . by our order of transfer have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed." *Knouse v. Nimocks*, 8 Cal.2d 482, 483, 66 P.2d 438 (1937).

[17] However, unlike the California statute, the Comparability Act to which the Adjustment Act refers does provide a legislative "escape" hatch: if there is a "national emergency or economic condition affecting the general welfare," the President may present an alternative to the mandatory adjustment. *See National Treasury Employees Union v. Nixon*, 492 F.2d 587, 601 (D.C. Cir. 1974) (in absence of submission of an alternative plan to Congress within time prescribed, the President has a non-discretionary duty to adjust federal workers' pay). If an alternative plan is presented by the President to Congress, either House may disapprove the plan by passing a resolution within thirty (30) days. 5 U.S.C. § 5305(c)(2). After such disapproval, the President must submit another alternative plan. In August 1979, for example, the President's pay agent recommended a 10.41% raise under the Comparability Act. However, because of the consequences of severe inflation, the President submitted an alternative plan calling for a 7% increase. Neither House of Congress disapproved the 7% increase within the time provided by the Comparability Act, and the 7% raise went into effect on October 1, 1979.

the consumer price index; for federal judges it is set by the rate increase for General Schedule employees under the Comparability Act.

As the reasoning of *More* and *Olson v. Cory* makes clear, a formula for judicial compensation is not entitled to any less protection than is a fixed salary. Increases under the Adjustment Act are part of judges' "compensation" and may not be withheld.

B. Article III Requires That Compensation Schemes Not Be Altered To Reduce Compensation During The Tenure Of Any Sitting Federal Judge.

The Government argues that holding that Congress cannot rescind automatic increases under the Adjustment Act would "unduly limit the constitutional province of Congress" and "might serve to inhibit innovation and experimentation" (Brief for the United States at 58.) That argument simply ignores the Compensation Clause. The precise purpose of Article III, cl. 1 is to limit Congressional power. Article III does not command Congress to choose any particular method or form of providing for judicial compensation. It merely provides that once a method is chosen, compensation may not be diminished during the tenure of a judge who takes office under that compensation scheme.

The Government correctly contends that under the holdings below Congress could not alter judicial compensation "in any manner that would afford sitting Article III judges a lesser salary than they would receive pursuant to the annual operation of the Adjustment Act." (Brief for the United States at 58.) Far from demonstrating error, that is exactly the goal of Article III. In Hamilton's words:

> "It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to day, might in half a century

become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; *yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.* A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation." *The Federalist*, No. 79, 531-32 (J. Cooke ed. 1961) (emphasis added).

The Compensation Clause does not impose an affirmative duty on Congress to raise judicial salaries.[18] However, it does act as a "one-way ratchet" so that any changes in judicial salaries may only increase compensation for judges in office. Further, once a stream of compensation is established, it may not be diminished as to judges who took office under that particular compensation scheme.[19]

The Government is clearly wrong in suggesting that the opinions below forever lock Congress into the current scheme governing judges' compensation. Congress may enact a new scheme for sitting judges so long as it does not diminish the compensation to which they are currently entitled, and Congress may enact any system it chooses for judges appointed after the new system became effective.[20]

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[18] *See Atkins v. United States*, 556 F.2d 1028, 1048 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978); Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308 (1976).

[19] *See Booth v. United States*, 291 U.S. 339 n.38 (1934).

[20] In *Olson v. Cory*, the California Supreme Court found that the legislature's amendment of the compensation scheme, although unconstitutional as to existing judges, was binding on judges taking office after the amendment became effective. 26 Cal.3d 672 (1980). Similarly, in *United States v. More*, 3 Cranch 159, 160 n. 1 (D.C. Cir. 1803), the court of appeals was careful to limit its holding that the schedule of fees for the services of federal justices of the peace did not necessarily apply to justices appointed after a new compensation scheme was enacted.

The principle that changes in judicial compensation may constitutionally apply to future judges, although ineffective for sitting judges, is consistent with cases decided by this Court. In *Evans v. Gore*, 253 U.S. 245 (1920), the Court ruled that a federal judge's salary could not be taxed under income tax statutes passed after his appointment because such a tax would be an unconstitutional diminution in salary. In *Miles v. Graham*, 268 U.S. 501 (1925) the Court held that even those judges appointed after the 1919 effective date for the tax statute could not be taxed. However, fourteen years later, in *O'Malley v. Woodrough*, 307 U.S. 277 (1939) the Court, in an opinion by Justice Frankfurter, overruled *Miles*. The compensation of any federal judge appointed after the passage of the Revenue Act of 1932 was deemed subject to income taxes. The Court in *O'Malley* specifically declined to consider the application of the taxing statute to judges who took office before the passage of the Act.[21] Further, although *Miles* was overruled, the Court did not overrule the *Evans* holding that judges were not liable under tax statutes enacted after they assumed office.[22]

The Supreme Court cases reviewed above and the reasoning of the recent California and Delaware cases support the conclusion that if Congress wishes to eliminate the annual adjustment to federal judicial salaries as provided by the Adjustment Act, it may do so, but only as to judges appointed after the provision is eliminated. To avoid the cost-of-living increases under the Adjustment Act for future judges, any annual adjustment can be made contingent on Congressional approval.[23]

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[21] 307 U.S. at 282.

[22] At least one circuit court interpreted this series of cases as protecting judges appointed prior to the taxing statutes, but not those judges taking office after the income tax statutes became effective. *See Baker v. Commissioner*, 149 F.2d 342, 343 (4th Cir.), *cert. denied*, 326 U.S. 746 (1945).

[23] It is not clear that there is any constitutional bar to such proposals. This Court has twice upheld state laws which created different rates of pay among state court judges against challenges

(Continued on following page)

Current judges are not the beneficiaries of an uncontrolled and unreasonable compensation scheme. In fact, the judges under the present system are simply partially protected from decreases in the real value of their salaries, just as are other federal employees under the Comparability Act. Upholding federal judges' rights to the mandatory annual adjustment provided by the Adjustment Act fulfills Article III's purposes and does not lock Congress into any particular compensation scheme for future federal judges.

C. The Compensation Clause Prohibition Against Reduction Of Compensation Does Not Require Proof Of Discrimination Against The Judiciary.

Contrary to the Government's argument, discriminatory intent to undermine judicial independence is not necessary to violate the Compensation Clause. Adoption of such a standard would radically alter existing law and undermine the protections of the Compensation Clause. The Government's interpretation subverts the purpose of Article III: namely, to preserve the courts, insofar as possible, from the influence of the executive and legislative branches. To that end, a judge is made secure in his or her position for life, and a judge's compensation may not be diminished during his or her tenure in that office.

(Continued from previous page)
based on the due process and equal protection clauses of the Federal Constitution. *See Kavanagh v. Brown*, 206 F.Supp. 479 (E.D. Mich.), *aff'd*, 371 U.S. 35 (1962) (state constitution prevented any increase during judges' term in office; statute raising supreme court justices' salaries therefore applied only to new appointees. Court held differential between rates not violative of due process or equal protection). *See also, Ohio Municipal Judges Ass'n v. Davis*, 411 U.S. 144 (1973) (increases in pay during terms of office for judges of Supreme Court and courts of appeals and of common pleas, with no increase for municipal and county judges, did not violate equal protection).

The Government argument virtually ignores the historic experience which led the Constitutional Convention to separate Article III judges from all other federal officeholders. One of the great causes of the rebellion which created the United States was that the King of Great Britain had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Declaration of Independence, quoted in *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933). In fashioning governments for the several states, the Founding Fathers had experimented with several formulas for judicial independence.[24] Finally, in Article III they agreed upon both life tenure and on non-diminishment of compensation during that tenure. As this Court recognized in *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939), the purpose of Article III was to protect judges "in their particular function in government." Thus, Article III removes from the legislative power the ability to innovate or experiment with compensation of judges in office, lest that tinkering influence the decisions of those judges.

Statutory and constitutional arguments which may apply to compensation claims of other federal employees are not necessarily relevant to Compensation Clause issues in light of the critical importance of guaranteeing "the complete independence of the courts of justice." *Id.* at 531. Thus, the fact that Article III requires the funding of cost-of-living increases pursuant to the Adjustment Act is consistent with the purposes of the Compensation Clause because it removes the discretionary power of the legislature over compensation for sitting judges.

The clear requirement of the Constitution is that any legislation which has the effect of reducing a "judge's salary as such"[25] is forbidden because it may tend to compromise his independence. That the challenged Pay Acts were not intended to punish the federal judiciary, that they were not formulated to

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[24] *See The Federalist*, No. 79, 533 (J. Cooke ed. 1961).

[25] *Evans v. Gore*, 253 U.S. 245, 265 (1920) (Holmes, J., dissenting).

bring about judicial dependence does not validate them, for innocent actions may have unintended and damaging consequences. Although the Pay Acts do not overtly threaten the judiciary, the withdrawal of promised compensation at a time of high inflation poses precisely the dangers which Article III was designed to prevent: a judiciary dependent on Congress for payment of their promised salaries. From our own colonial past through contemporary foreign examples, history teaches that demoralized and dependent judges are ill-equipped to withstand attacks on their powers or to preserve the rights of citizens.

Alexander Hamilton wrote in supporting the adoption of Article III that permanent tenure in office is the greatest safeguard of independence in the judiciary and that fixed compensation was the second most important safeguard. Failure to assure adequate, fixed compensation may dilute the independence of the judiciary by, on the one hand, restricting judicial office to those of independent wealth or without family obligations and, on the other hand, increasing pressures on the judiciary to seek legislative relief.[26] Thus, the refusal to fund promised compensation threatens judicial independence irrespective of the intention of Congress, and it falls under the prohibition of Article III.

The Government's argument for requiring discriminatory intent rests on a misreading of *O'Malley v. Woodrough*, 307 U.S. 277 (1939). In that case the Supreme Court reversed a judgment that the Revenue Act of 1932 was unconstitutional insofar as it provided for taxation of the salary of federal judges as income. *O'Malley* held that imposition of an income tax on judges' salaries was not a violation of the Compensation Clause where such taxation constituted merely a recognition that the federal judges' "particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Id.* at 282. Thus, the Court in *O'Malley* rightly looked to the "great historic

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[26] *See* Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308 (1976).

experience" on which the Compensation Clause was built and analyzed the case before it in terms of whether a judge's "particular function in government" should generate immunity from the decrease in compensation under challenge. Judges, as citizens, were subject to the same burdens borne by their fellow citizens. The common duties of citizenship, the Court held, did not make inroads upon the independence of the judiciary.[27]

Unfortunately, the Government has expanded *O'Malley's* analysis to erect a virtually insurmountable barrier to any challenges to reduction of judicial compensation.

Nothing in *O'Malley* even remotely suggests that specific intent to discriminate against judges is necessary to violate the Compensation Clause. *O'Malley* says nothing about evidence of "antagonism against the judiciary" or an "attack on judicial independence."[28] (Brief for the United States at 64.) As the Brief Amicus Curiae on Behalf of the American Bar Association convincingly demonstrates, such requirements of proof would be impossible to meet in the ordinary case and are irrelevant to the purpose of the Compensation Clause: to guarantee that federal judges "might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which as master of the purse, would otherwise hold the power to reduce their means of support." *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933). *See* Brief of Amicus Curiae American Bar Association at 19-20.

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[27] This category of permissible burdens on judicial compensation is narrow, however. Judges are not constitutionally subject to decreases in compensation merely because such diminution affects a large class of persons, but only where the financial burden comprises a common duty of citizenship. For example, in *Booth v. United States*, 291 U.S. 339 (1934), this Court ruled unconstitutional a law reducing retired judges' salaries by 15%, even though all other federal employees' salaries were reduced by the same rate.

[28] *O'Malley* in fact involved an express attempt by Congress to diminish judicial salaries by making them subject to the income tax statutes. Despite this clear "discriminatory" intent to bring judges under the statute, the diminution was held constitutional because it arose from a judge's duty as a citizen and affected all citizens, so judges were therefore subject to it as well.

CONCLUSION

For the foregoing reasons, the judgments of the district court should be affirmed.

August 11, 1980

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Appellant,

v.

HUBERT L. WILL, ET. AL.,

Appellees.

On Appeals from the United States
District Court for the Northern District of Illinois

BRIEF AMICUS CURIAE OF THE WASHINGTON STATE BAR ASSOCIATION SUPPORTING APPELLEES

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Brief of Amicus Curiae Washington State Bar Association In Support of Appellees

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 36.3, the Washington State Bar Association has moved the Court for permission to file this brief in support of the claims of plaintiffs/appellees, federal

judges in the instant cases.

The Washington State Bar Association is an unified bar association of approximately 10,000 members. It is the tenth largest unified bar association in the United States.

The Board of Governors of the Association and its members are deeply concerned about the quality of the judiciary in both the United States and Washington State court systems. One of the goals of the Washington State Bar Association, according to its by-laws, is to "facilitate the administration of justice." To accomplish this goal, there is a standing committee of the Association which assists, at all levels, with the selection of the members of the judiciary.

The members of this Association, many of whom practice before the federal bench, have firsthand experience with the problems created by the delay in obtaining trials of civil cases in federal courts. This severe problem is created, in part, by the difficulty in attracting the ablest men and women to serve

on the federal bench.

This Bar Association firmly believes that federal judges must receive higher compensation, and that the Acts of Congress at issue in these appeals diminish the compensation of federal judges and thus detract from the goal of attracting the ablest federal judges.

The Association files this brief in support of the appellees, judges because it is firmly committed to the concept of the separation of powers, the heart of the Compensation Clause of the United States Constitution.

This Association has had experience, at the state level, with the necessity of maintaining the doctrine of the strict separation of powers. The Association is concerned that a decision adverse to the plaintiffs/appellees judges would have an adverse impact upon the separation of powers doctrine as it has been interpreted by the Washington State Courts, and a detrimental impact upon the administration of justice in the State of Washington.

SUMMARY OF ARGUMENT

I.

The Association adopts by reference and reaffirms the jurisdictional, statutory and constitutional arguments of the appellees, judges and amicus curiae, American Bar Association, Los Angeles County Bar Association and the Chicago Bar Association.

II.

The Association believes that the concept of separation of powers, which is the heart of the Compensation Clause, will be undermined, if the Court does not affirm the decisions of the United States District Court for the Northern District of Illinois. The Association's experience with the need for a strong doctrine of the separation of powers mandates that it urge that this doctrine be upheld and the District Court's decisions be affirmed.

ARGUMENT

I.

THE WASHINGTON STATE BAR ASSOCIATION

ADOPTS BY REFERENCE AND REAFFIRMS THE JURISDICTIONAL, STATUTORY AND CONSTITUTIONAL ARGUMENTS OF THE APPELLEES/JUDGES AND AMICUS CURIAE, AMERICAN BAR ASSOCIATION, LOS ANGELES COUNTY BAR ASSOCIATION AND CHICAGO BAR ASSOCIATION.

II.

SEPARATION OF POWERS, THE HEART OF THE COMPENSATION CLAUSE, MUST BE UPHELD AND THEREFORE THE DECISIONS OF THE DISTRICT COURT OF THE NORTHERN DISTRICT OF ILLINOIS SHOULD BE AFFIRMED.

Appellees, and amicus curiae argue persuasively that the independence of the federal judiciary requires affirmance of the District Court's rulings. (e.g. ABA Bf. at 18-19). The Washington State Bar Association echoes these arguments and respectfully points out that a contrary decision may have an adverse impact upon judicial independence outside of the federal judicial system.

The Washington State Bar Association

expresses this concern because, in carrying out the functions of attorney discipline and admission to practice, it is an arm of the judicial branch of the state government, the Supreme Court of the State of Washington. State ex. rel. Schwab v. State Bar Association, 80 Wn.2d 266, 269, 493 P.2d 1237 (1972).

Historically, the Washington State Bar Association has zealously advocated the independence of the judicial branch and has resisted any intrusion by the legislature or the executive branch.

In In re Ellis, 118 Wash. 484, 203 Pac. 957 (1912), the Board of Law Examiners required all applicants for admission to pass a bar examination, and the Supreme Court of the State of Washington held that a statute which permitted a diploma privilege admission did not negate that requirement of a bar examination because the legislation only suggested a diploma privilege it did not require it.

In 1945, the Washington State Supreme

Court refused to grant admission to applicants who had not passed the bar examination but were veterans of military service, despite a statute authorizing admission under these circumstances during World War II. The court held that the statute was not mandatory and did not change the court rule which admitted veterans only under limited circumstances. In re Levy, 23 Wn.2d 607, 161 P.2d 651 (1945).

Another veteran attempted to gain admission upon motion in 1947, and, again, the Bar Association refused to recommend admission because the veteran had not met the requirements set forth by the court rule that he had to have been in active legal practice for five years after admission to practice in South Dakota. The Washington State Supreme Court upheld this interpretation. State ex. rel. Laughlin v. State Bar Association, 26 Wn.2d 914, 176 P.2d 301 (1947).

The Washington State Bar Association resisted an attempt to require that the offices

of the Association be moved to the state capital as constitutionally required of all departments of the executive. The Association was held not to be required to move its office because it was not an executive department but instead a sui generis association whose important functions are directly related to and in aid of the judicial branch. State ex. rel. Schwab v. State Bar Association, supra at 493.

The Washington State Bar Association's continued assertion of the doctrine of separation of powers and the independence of the judiciary was also challenged by what the Association viewed as the most serious attempt by the executive branch of Washington State government to encroach upon judicial independence.

In 1974, the Washington State Auditor, an elected officer of the executive branch, attempted to conduct an audit of the Washington State Bar Association. Except with regard to admissions fees, the Bar Association

resisted the Auditor's attempt to subpoena its books and records. The trial court refused to honor the Auditor's request and issue the subpoena. The Auditor appealed to the Washington State Supreme Court.

The Bar Association's resistance was not based upon a desire to hide any information. Indeed, the Bar Association's books were independently audited each year. The Bar Association took the position that such an audit would be an unconstitutional violation of the doctrine of separation of powers.

The Washington State Supreme Court upheld the Bar Association's position finding that the legislature did not intend to give the auditor authority to audit the Bar Association, and, if the legislature did so intend, the principles that the regulation of the practice of law was inherently a judicial power, and that in an integrated bar the court has the inherent power to authorize the raising of funds from the members of the legal profession

free from legislative authorization or participation, meant that, if the legislature intended to extend its audit powers to the bar association,: "such an attempt is an unwarranted and unconstitutional interference with the power of this separate branch of government [the judiciary] to make necessary rules and regulations governing the conduct of the bar." Graham v. Bar Association, 86 Wn.2d 624, 633, 548 P.2d 310 (1976).

As outlined above, the Washington State Bar Association has, because the concept is the core of the unified bar and the judicial regulation of the practice of law, continuously and vigorously defended the independence of the judiciary. A decision reversing the District Court's rulings will surely have an impact upon the independent state judiciaries. A decision that requires discriminating intent or somehow erodes any of the protections given to the judiciary by the Compensation Clause could diminish the under-

pinnings of the doctrine of separation of powers as interpreted by the Washington Courts.

If this detrimental impact spreads to the state level, where, as in Washington State, judges are elected, a diminishing of the doctrine of separation of powers would permit and might encourage political pressure upon or political retaliation for judicial decisions. This pressure or retaliation could take the form of the legislature withdrawing funding for courts which render unpopular decisions. Legislatures may also be encouraged to attempt unwarranted interference in the actual functioning of courtrooms such as procedural interference or burdensome watchdog provisions.

Any interference with the judiciary which impairs the ability of the courts to function independently will clearly diminish the ability of state government to function.

Of more immediate concern to the Association is the possible encroachment upon the

independence of the bar as an arm of the judiciary. The Washington State Supreme Court has constantly held that it was the only body with the authority to regulate the practice of law. In re Lambuth, 18 Wash. 478, 51 Pac. 1071(1898). The Court has stated that the reason for this exercise of judicial power is to promote the proper administration of justice and to protect the public. In re Bruen, 102 Wash. 472, 172 Pac. 1152 (1918). Attorneys, unlike other professionals, are officers of the court, and, because of their involvement, are directly linked to the administration of justice. Therefore, the qualifications of lawyers and the regulation of the practice of law must remain an inherent power of the judiciary unfettered by legislation intrusion. Any lessening of the doctrine of the separation of powers could threaten that function and permit the legislative intrusion which has been consistently resisted.

CONCLUSION

A decision affirming the District Court's decisions will demonstrate that the doctrine of the separation of powers remains as strong as ever. The Washington State Bar Association urges the Court to affirm the decision and direct that the federal judges receive the compensation they are entitled to.

October 8, 1980.

Respectfully Submitted,

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